



## Judicial Council of California · Administrative Office of the Courts

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# REPORT TO THE JUDICIAL COUNCIL

For business meeting on: April 29, 2011

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Title	Agenda Item Type
Alternative Dispute Resolution (ADR): Mediator's Statement of Agreement or Nonagreement and Statistical Reports	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Adopt Cal. Rules of Court, rules 3.835 and 3.845; amend rule 3.895; repeal rule 3.897; and revise form ADR-100	July 1, 2012
Recommended by	Date of Report
Civil and Small Claims Advisory Committee	March 4, 2011
Hon. Dennis M. Perluss, Chair	Contact
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### **Executive Summary**

The Civil and Small Claims Advisory Committee recommends that the Judicial Council revise the form that mediators are required to use to report the results of mediations conducted under the Civil Action Mediation Program (CAMP) and amend the California Rules of Court to, among other things, provide that mediators must use this form whenever they are required to report the status or result of the mediation of any general civil case to a superior court. These changes will promote uniformity and usefulness of mediator reports to courts in general civil cases and help ensure that the reports are consistent with California's mediation confidentiality statutes.

### **Recommendation**

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective July 1, 2012:

1. Adopt rule 3.835 to provide that the rules in article 1, chapter 3, division 8, title 3 of the California Rules of Court apply to all court mediation programs for general civil cases, unless otherwise specified;
2. Adopt rule 3.845, within article 1, to provide that if a mediator is required to submit a statement or report to the court concerning the status or result of a mediation of a general civil case, the statement or report must be submitted on *Statement of Agreement or Nonagreement* (form ADR-100) and must be consistent with California's mediation confidentiality statutes;
3. Amend rule 3.895 to provide that if a CAMP mediation has not ended when the initial form ADR-100 is filed, the mediator must file a supplemental ADR-100 within 10 days after the mediation is concluded or by another date set by the court;
4. Repeal rule 3.897 to eliminate the requirement that courts submit quarterly reports about CAMP mediations to the Judicial Council; and
5. Revise form ADR-100 to:
  - Add a subitem for mediators to indicate that a mediation was not scheduled;
  - Delete the subitems asking mediators to indicate the reason a mediation did not take place;
  - Delete the subitems asking mediators to indicate the type of a partial agreement that was reached; and
  - Add subitems for mediators to provide the anticipated completion date and next mediation session date of a mediation that has not ended.

The text of the proposed rule changes is attached at pages 10–11, and a copy of form ADR-100 showing the proposed changes is attached at pages 12–13.<sup>1</sup>

### **Previous Council Action**

At its meeting on February 24, 1994, the Judicial Council adopted rules 3.895 and 3.897 and approved form ADR-100 to implement the Civil Action Mediation Program established by Code of Civil Procedure section 1775.1 et seq. At its meeting on November 1, 2002, the council revised form ADR-100 to, among other things, add items for mediators to conveniently inform courts that a mediation:

- Did not take place, and the reason it did not;
- Had not yet ended; or
- Had ended in a partial agreement that consisted of either full agreement between some parties or full agreement on limited issues.

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<sup>1</sup> The proposed revisions to form ADR-100 are not shown in shading because the most significant changes involve deletions.

## **Rationale for Recommendation**

CAMP operates in the Superior Court of Los Angeles County and in other superior courts at the discretion of the presiding judge. (Code Civ. Proc., § 1775.2.)<sup>2</sup> CAMP mediation is currently authorized in at least 11 courts. The CAMP statutes do not preempt other alternative dispute resolution (ADR) programs (Code Civ. Proc., § 1775.15) and many superior courts have established other, local mediation programs for general civil cases.

## **Changes to the rules**

The CAMP statutes require the Judicial Council to adopt implementing rules (Code Civ. Proc. § 1775.15), and the council has adopted rules 3.890–3.898 of the California Rules of Court for this purpose. The statutes and rules require that mediators in cases assigned to CAMP mediation file form ADR-100 with the court within 10 days after the mediation is concluded. (See Code Civ. Proc., § 1775.9 and Cal. Rules of Court, rule 3.895.) At least nine courts also require that mediators file form ADR-100 in civil cases that are assigned to mediation under their local programs.<sup>3</sup> Thus, form ADR-100 is already the de facto standard form by which mediators inform courts of the status and results of court-program mediations for general civil cases (other than custody and visitation matters).

Adopting rules 3.835 and 3.845 to require the use of form ADR-100 whenever a mediator is required to report the status or results of the mediation of a general civil case will conform the rules to existing practice, promote consistent reports and data about court-program mediations conducted throughout the state, and, most importantly, help ensure that mediator reports comply with California’s mediation confidentiality statutes.<sup>4</sup> As discussed below, the advisory committee has considered two rounds of public comments and balanced a number of considerations in determining the information that should be requested in form ADR-100 to minimize the risk that a mediator’s report to a court may violate the confidentiality statutes.

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<sup>2</sup> In general, the CAMP statutes allow participating courts to submit unlimited civil cases that the court determines involve no more than \$50,000 in controversy (for each plaintiff) to mediation instead of to judicial arbitration under Code of Civil Procedure section 1141 et seq.

<sup>3</sup> Mediators were also required to file form ADR-100 after the conclusion of mediations conducted under legislatively mandated Early Mediation Pilot Programs, which five courts conducted from approximately 2000 through 2004.

<sup>4</sup> Sections 1115–1128 of the Evidence Code establish the confidentiality and limit court consideration of communications and conduct in the course of a mediation. Section 1119 generally provides that communications made and writings prepared “for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation” are not admissible or subject to discovery in any noncriminal proceeding in which testimony can be compelled to be given and that all communications in the course of a mediation or a mediation consultation “shall remain confidential.” Section 1121 provides that no one may submit to a court and a court may not consider “any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise . . .” Section 1115 defines mediation as “a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement” and defines mediation consultation as “a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.”

Amending rule 3.895 will give courts flexibility to set the date when mediators must file form ADR-100 in CAMP mediations, help courts track cases assigned to CAMP mediation, and help ensure that courts are informed of the results of mediations that are concluded after the date set by the court.

Repealing rule 3.897 will terminate an obsolete requirement that courts submit quarterly reports about CAMP mediations to the Judicial Council.<sup>5</sup>

### Revisions to form ADR-100

Form ADR-100 currently includes the following provisions for the mediator to report the reason that a mediation did not take place:

3. Mediation (*check one*):
- a.  did not take place.
    - (1)  A party who was ordered to appear at the mediation did not appear.
    - (2)  Other reason (*please specify without disclosing any confidential information*):

Form ADR-100 also currently includes the following provisions for the mediator to report the results of a mediation that did take place:

5. The mediation ended (*check one*):
- a.  in full agreement by all parties on (*date*):
  - b.  in partial agreement
    - (1)  in full agreement as to the following parties:  
on (*date*):
    - (2)  in full agreement as to limited issues on (*date*):
  - c.  in nonagreement.

Revising form ADR-100 to remove the subitems that ask the mediator to indicate the reason a mediation did not take place (subitems 3.a.(1) and (2)) and the type of a partial agreement that was reached (subitems 5.b.(1) and (2)) will help ensure that mediator reports to courts are consistent with the mediation confidentiality provisions of Evidence Code section 1115 et seq. The advisory committee recognizes that it is often important for courts to know why a court-connected mediation did not take place or the type of partial agreement that was reached so that the court can take appropriate follow-up action. The committee has concluded that mediators can provide the limited information that the current form requests without violating the confidentiality statutes. However, a mediator's report might easily enter or cross a gray area between permissible and impermissible disclosures and, in many circumstances, the court will

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<sup>5</sup> Rule 3.897 was adopted to implement Code of Civil Procedure section 1775.14, which required the Judicial Council to collect information from the courts that apply the CAMP statutes and to report to the Legislature concerning ADR programs. The data submission requirement is no longer necessary because the Judicial Council has submitted the required report to the Legislature.

require more information than a mediator reports.<sup>6</sup> This may precipitate further inquiry of the mediator by the court or court staff. It may be difficult for those who are not well versed in mediation confidentiality law to discern what information the mediator may permissibly provide. After balancing these and other considerations, the committee concluded that it would be best to minimize the risk of mediators making impermissible disclosures by having the mediator report the limited information that a mediation did not take place or resulted in partial agreement and having the court request any additional information that it may require from the parties.<sup>7</sup>

Adding subitems for mediators to indicate that a mediation was not scheduled and to provide the anticipated completion date and next mediation session date of a mediation that has not ended will help courts track and appropriately manage cases assigned to court-connected mediation programs.

### **Comments, Alternatives Considered, and Policy Implications**

This proposal was initially circulated for public comment in spring 2010. The spring invitation to comment (ITC) would have removed the subitems currently on form ADR-100 for mediators to report the reason a mediation did not take place and clarified the subitems for mediators to report the type of partial agreement that was reached in a mediation.

Comments to the spring proposal suggested deleting rather than revising the subitems asking mediators to report the type of partial agreement reached. Because the committee agreed with this suggestion but the spring ITC had not indicated this possibility, the committee circulated a revised proposal in the winter 2011 comment cycle. The winter proposal also revised (rather than deleted) the subitems on form ADR-100 for mediators to report the reason a mediation did not take place and included a new proposed amendment to rule 3.845, which would allow courts to require that mediators attach a supplemental local form to form ADR-100.

### **General comments on the current proposal**

Thirteen organizations and individuals submitted comments on the winter proposal. Four agreed with the proposal, four agreed with the proposal if modified, and none disagreed with the proposal. Five commentators did not expressly state one of these positions, but four of these commentators implied that they would agree with the proposal if it were modified.<sup>8</sup> A chart with all of the comments and the advisory committee's responses to them is attached at pages 14–36.

The most significant policy issues raised by the comments are (1) whether form ADR-100 should prompt mediators to indicate the reason a mediation did not take place, and (2) whether courts

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<sup>6</sup> For example, if a mediator permissibly reports that a mediation did not take place because a required person did not attend, to determine the appropriate follow-up action, the court will likely need to know who did not attend and why they did not, which the mediator might not be allowed to disclose.

<sup>7</sup> Although reports by a party of why a mediation did not take place create some risk of violating confidentiality, this risk is less than that of the mediator reporting the reason.

<sup>8</sup> One commentator, a court, stated that it had reviewed the proposal and did not have any comments to submit.

should be allowed to require that mediators attach a supplemental local form to form ADR-100. The comments concerning these provisions primarily relate to their potential impact on mediation confidentiality and are summarized below.

### **Mediator reports of why a mediation did not take place**

The spring proposal would have deleted the provisions asking the mediator to report the reason a mediation did not take place and expressly requested comments about doing so. Only two commentators addressed this question and they expressed opposing views. After considering these comments and other factors, the advisory committee concluded that the winter proposal should retain and revise these provisions.

Although the winter proposal did not specifically request comments about whether to retain or delete the subitems for mediators to indicate why a mediation did not take place, seven commentators addressed this issue. One commentator favored retaining and revising these subitems because this would make court-connected mediation programs and civil departments more efficient.<sup>9</sup> Six commentators suggested deleting (rather than revising) the subitems on the basis that a mediator's report of why a mediation did not take place might violate or lead to a violation of mediation confidentiality.<sup>10</sup> As discussed above in the rationale section, the advisory committee ultimately concluded that the subitems asking why a mediation did not take place should be deleted from form ADR-100.

### **Supplemental local attachments to form ADR-100**

In response to the spring proposal, the ADR administrator for the Superior Court of Santa Clara County expressed concerns about extending the requirement to use form ADR-100 to non-CAMP mediations, because that court asks mediators to submit additional information that is helpful to evaluate its mediation programs. In an attempt to address this concern, rule 3.845 of the winter proposal would have allowed courts to require, by local rule, that mediators attach a supplemental form to ADR-100 requesting additional information that the mediation confidentiality statutes do not prohibit mediators from disclosing. The winter proposal specifically invited comments about whether the rules should allow courts to require that mediators attach supplemental forms to form ADR-100 and, if so, whether form ADR-100 should provide a check box for mediators to indicate that a local supplement is attached.

Ten commentators addressed one or both questions about supplemental local attachments. Four commentators thought that courts should be allowed to require supplemental attachments—although one did not think this should be expressly authorized by rule 3.845—and six commentators thought they should not.

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<sup>9</sup> See comment of the Superior Court of Riverside County.

<sup>10</sup> See comments of the California Dispute Resolution Council, the Contra Costa County Bar Association ADR section, Ms. Magda Lopez, the Orange County Bar Association, the Superior Court of San Diego County, and the State Bar ADR Section.

The commentators who supported allowing supplemental local attachments generally indicated that this would be useful or supported this without explanation.<sup>11</sup> The commentators who opposed allowing supplemental local attachments expressed a variety of reasons, including concerns that these attachments may result in violations of mediation confidentiality;<sup>12</sup> would undermine the goal of uniformity, which was one of the primary reasons for expanding the requirement to use form ADR-100;<sup>13</sup> and are unnecessary because form ADR-100 is sufficient.<sup>14</sup> Two commentators suggested that if supplemental local attachments are permitted, they should not become part of the court's case file.<sup>15</sup>

The advisory committee concluded that rule 3.845 should not include a specific provision allowing courts to require the attachment of a supplemental local form to form ADR-100, and that form ADR-100 should therefore not include a check box to indicate that a supplemental local form is attached. The committee agreed with the comments that allowing supplemental local attachments would undermine the original goals of establishing a uniform statewide form for mediators to report the status and results of court program mediations, which included avoiding confusion about what form of report should be submitted in any particular mediation program and helping to ensure that mediator reports do not violate the confidentiality statutes. The committee also agreed that the information requested on form ADR-100 should generally be sufficient to inform courts about the status and results of court program mediations.

However, the committee is proposing an Advisory Committee Comment indicating that rule 3.845 does not prohibit courts from asking mediators to provide other information about court-program mediations on separate forms or surveys that do not solicit any information that will allow identification of a specific case or mediation participant and that will not become part of the court's case file. The committee concluded that this approach would allow courts to obtain additional information that may help them evaluate and improve their mediation programs without undermining the purposes of a uniform mediator report form.

### **Reporting the type of partial agreement**

The spring proposal would have revised the subitem regarding partial agreements to clarify the types of partial agreements. Only two commentators addressed this aspect of the proposal and both suggested removing rather than revising these subitems because a mediator's report of this

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<sup>11</sup> See comments of Ms. Magda Lopez, the Rules and Legislation Committee of the State Bar Legislation Section, and the Superior Courts of Monterey and San Diego Counties.

<sup>12</sup> See comments of the California Dispute Resolution Council, the ADR Section of the Contra Costa Bar Association, the Orange County Bar Association, and the State Bar ADR Committee.

<sup>13</sup> See comments of the Orange County Bar Association and the State Bar ADR Committee.

<sup>14</sup> See comments of the ADR Section of the Contra Costa Bar Association and Mr. Al Glover. The comment of the Superior Court of Monterey County, which supports allowing local supplements, also suggests that form ADR-100 is sufficient.

<sup>15</sup> See comments of the California Dispute Resolution Council and the Superior Court of Riverside County.

information might violate or lead to a violation of mediation confidentiality. As noted above, the committee adopted these suggestions and deleted the subitems from the winter proposal. The one commentator who addressed this revision in the winter proposal supported deleting these subitems.<sup>16</sup>

### **Use of form ADR-100 in certain special proceedings**

The spring proposal would have provided that form ADR-100 must be used when mediators are required to report the status or results of the mediation of small claims, unlawful detainer, and civil harassment proceedings, as well when reporting about mediations of general civil cases. However, one court commented that it does not currently use form ADR-100 for mediation programs that operate in its courthouse at or near the same time as the court's calendar and has adopted other processes and forms to more immediately capture the results of those mediations and other necessary information. Based on this comment and another consideration, the committee revised rule 3.835 in the winter proposal to limit the new article 1, which would include the provision that any required mediator reports must be submitted on form ADR-100, to general civil cases as defined in rule 1.6 of the California Rules of Court. This definition excludes small claims, unlawful detainer, and civil harassment proceedings, which are the types of cases in which mediations are typically conducted in the courthouse close to the time of a scheduled hearing.<sup>17</sup>

### **Implementation Requirements, Costs, and Operational Impacts**

The proposed changes are not expected to impose any significant implementation requirements or costs on the courts or the Administrative Office of the Courts. Form ADR-100 is already the de facto standard form for reporting the results of court-connected mediations of general civil cases. And the ability to capture the filing of form ADR-100 is already part of the design of the new California Court Case Management System (CCMS). Finally, the proposed effective date of July 1, 2012, will allow courts and mediators more than a year to use existing stock of the current form and to implement any changes necessary to use the revised form.

### **Relevant Strategic Plan Goals and Operational Plan Objectives**

This proposal supports Goal III, Modernization of Management and Administration, by ensuring that statewide policies, rules of court, and court forms promote the fair, timely, effective, and efficient processing of cases and make court procedures easier to understand. It also supports

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<sup>16</sup> See comment of the Orange County Bar Association.

<sup>17</sup> The other reason for limiting the new article 1 to general civil cases is that most of the other rules governing civil mediation programs that the Judicial Council has adopted apply only to those cases. (See, e.g., the Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases (rules 3.850 et seq.), Requirements for Addressing Complaints About Court-Program Mediators (rule 3.865 et seq.), and the recently adopted requirements related to qualifications of mediators (rule 3.865(a)). The advisory committee concluded it would be more appropriate to consider proposing more comprehensive rules and forms specifically designed for mediations of small claims, unlawful detainer, and civil harassment proceedings than to extend the application of rules and forms regarding mediator reports that were designed for general civil cases to these proceedings.

Goal IV, Quality of Justice and Service to the Public, by helping to improve successful dispute resolution programs.

**Attachments**

1. Cal. Rules of Court, at pages 10–11
2. Form ADR-100, at pages 12–13
3. Chart of comments, at pages 14–36



Rules 3.835 and 3.845 of the California Rules of Court would be adopted; rule 3.895 would be amended; and rule 3.897 would be repealed, effective July 1, 2012, to read as follows:

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

2  
3                   **Article 1. ~~[Reserved]~~ Procedures for All Court Mediation Programs**

4  
5                   **Rule 3.835. Application**

6  
7                   The rules in this article apply to all court mediation programs for general civil cases, as  
8                   defined in rule 1.6, unless otherwise specified.

9  
10                  **Rule 3.845. Form of Mediator Statements and Reports**

11  
12                  If a mediator is required to submit a statement or report to the court concerning the status  
13                  or result of the mediation, the statement or report must be submitted on the Judicial  
14                  Council *Statement of Agreement or Nonagreement* (form ADR-100). The mediator's  
15                  completed form ADR-100 must not disclose the terms of any agreement or any other  
16                  communications or conduct that occurred in the course of the mediation, except as  
17                  allowed in Evidence Code sections 1115–1128.

18  
19                                           **Advisory Committee Comment**

20  
21                  This rule does not preclude courts from asking mediators to provide other information about  
22                  court-program mediations on separate forms or surveys that do not request any information that  
23                  will allow identification of a specific case or mediation participant and that will not become part  
24                  of the court's case file.

25  
26                                           **Chapter 4. Civil Action Mediation Program Rules**

27  
28                  **Rule 3.895. Filing of Statement of Agreement or Nonagreement by mediator**

29  
30                  Within 10 days after conclusion of the mediation, or by another date set by the court, the  
31                  mediator must complete, serve on all parties, and file a ~~statement on~~ *Statement of*  
32                  *Agreement or Nonagreement* (form ADR-100), ~~advising the court whether the mediation~~  
33                  ~~ended in full agreement or nonagreement as to the entire case or as to particular parties in~~  
34                  ~~the case.~~ If the mediation has not ended when the report is filed, the mediator must file a  
35                  supplemental form ADR-100 within 10 days after the mediation is concluded or by  
36                  another date set by the court. The completed form ADR-100 must not disclose the terms  
37                  of any agreement or any other communications or conduct that occurred in the course of  
38                  the mediation, except as allowed in Evidence Code sections 1115–1128.

1 **Rule 3.897. Statistical information**

2  
3 **(a) — Quarterly information reports**

4  
5 Each court must submit quarterly to the Judicial Council pertinent information on:

6  
7 (1) — The cost and time savings afforded by mediation;

8  
9 (2) — The effectiveness of mediation in resolving disputes;

10  
11 (3) — The number of cases referred to mediation;

12  
13 (4) — The time cases were in mediation; and

14  
15 (5) — Whether mediation ended in full agreement or nonagreement as to the entire  
16 case or as to particular parties in the case.

17  
18 **(b) — Submission of reports to the Judicial Council**

19  
20 The information required by this rule must be submitted to the Judicial Council  
21 either on the *Statement of Agreement or Nonagreement* (form ADR-100) and *ADR*  
22 *Information Form* (form ADR-101) or as an electronic database that includes, at a  
23 minimum, all of the information required on these forms. The format of any  
24 electronic database used to submit this information must be approved by the  
25 Administrative Office of the Courts.

26  
27 **(c) — Parties and mediators to supply information**

28  
29 Each court must require parties and mediators, as appropriate, to supply pertinent  
30 information for the reports required under this rule.

31  
32 **(d) — Alternative reporting method**

33  
34 On request, a court may report cases in mediation under the rules in this chapter  
35 under the appropriate reporting methods for cases stayed for contractual arbitration.

MEDIATOR (Name and Address):  TELEPHONE NO.: _____ FAX NO.: _____ E-MAIL ADDRESS: _____	<b>FOR COURT USE ONLY</b>  <b>Not approved by the Judicial Council</b>  Draft Rev. 3-9-11
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF</b>  STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
<b>STATEMENT OF AGREEMENT OR NONAGREEMENT</b>  <input type="checkbox"/> First <input type="checkbox"/> Supplemental	CASE NUMBER:
<p><b>The mediator must complete, serve, and file this form</b></p> <ul style="list-style-type: none"> <li>• within 10 days after conclusion of the mediation, or by an another date set by the court, in all cases assigned to mediation under the Civil Action Mediation Program. (Code Civ. Proc., § 1775 et seq.)</li> <li>• as required by the court in other mediation programs.</li> </ul> <p><b>In completing this form, the mediator must not</b></p> <ul style="list-style-type: none"> <li>• provide any information beyond what is specifically requested, or</li> <li>• disclose any settlement terms, confidential communications, mediation conduct, or mediator conclusions or impressions. (Evid. Code, § 1115 et seq.)</li> </ul>	

1. I was appointed, assigned, or retained as the mediator in this case on (date):

2. The mediation (check one)

- a.  was not scheduled.
- b.  was scheduled but not held.
- c.  was held as follows:
- (1) Session dates (specify all):
- (2) Number of sessions:
- (3) Total length of sessions (hours):

3.  The mediation ended on (date):

- a.  in a full agreement.
- b.  in a partial agreement.
- c.  in nonagreement.

4.  The mediation has not yet ended. I submit this form to comply with the court's requirement to do so by a specified date. (Complete the items below. In Civil Action Mediation Programs and where otherwise required by the court, file a supplemental Statement of Agreement or Nonagreement within 10 days after the mediation ends or by such other date as the court may set.)

a. The mediator anticipates that the mediation will be completed by (date):

**NOTICE TO PARTIES:** This form does not extend any mediation completion deadline that the court has set. You must request any necessary extension from the court.

b. The next mediation session is scheduled for (date):

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF MEDIATOR)

**PROOF OF SERVICE OF STATEMENT OF AGREEMENT OR NONAGREEMENT**

1. At the time of service, I was over 18 years of age and **not a party to this action**.
2. My residence or business address is:
3.  The fax number or electronic service address from which I served the document is *(complete if service was by fax or electronic service)*:
4. I served the *Statement of Agreement or Nonagreement* (form ADR-100) on the person or persons below, as follows:

a. Name of person served	b. Manner of service <i>(specify personal, mail, fax, or electronic)</i>	c. Physical or mailing address, fax number, or electronic service address where person was served	d. Date of service	e. Time of service

5. The form ADR-100 was served by the following means *(check and complete all that apply)*:
  - a.  **Where personal service is indicated in item 4.b.**, I personally delivered the form ADR-100 to the persons for whom personal service is indicated, at the addresses listed in item 4.c. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the document in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office, or in a visible location in the office between the hours of 9 a.m. and 5 p.m. (2) For a party, delivery was made to the party or by leaving the document at the party's residence with some person not younger than 18 years of age between the hours of 8 a.m. and 6 p.m.
  - b.  **Where service by mail is indicated in item 4.b.**, I enclosed the form ADR-100 in a sealed envelope or package addressed to the persons at the addresses in item 4.c. and *(specify one)*:
    - (1)  deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
    - (2)  placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident of or employed in the county where the mailing occurred. The envelope or package was placed in the mail at *(city and state)*:
  - c.  **Where fax transmission is indicated in item 4.b.**, based on an agreement of the parties to accept service by fax transmission, I faxed the form ADR-100 to the persons at the fax numbers listed in item 4.c. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed, is attached.
  - d.  **Where electronic service is indicated in item 4.b.**, I caused the form ADR-100 to be served on the persons at the electronic service addresses listed in item 4.c., in accordance with a court order or an agreement of the parties allowing electronic service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

\_\_\_\_\_

(TYPE OR PRINT NAME)



\_\_\_\_\_

(SIGNATURE OF DECLARANT)

**ITC number W11-01**

**Alternative Dispute Resolution (ADR): Mediator’s Statement of Agreement or Nonagreement and Statistical Reports to Judicial Council** (Adopt Cal. Rules of Court, rules 3.835 and 3.845; amend rule 3.895; repeal rule 3.897; revise form ADR-100)

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

<b>List of All Commentators, Overall Positions on the Proposal, and General Comments</b>				
	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
1.	California Dispute Resolution Council By John Horn, President	N/I	See comments on specific provisions below.	
2.	Contra Costa County Bar Association, Alternative Dispute Resolution Section By John S. Warnlof, Chair	N/I	See comments on specific provisions below.	
3.	Al Glover Administrative Analyst Superior Court of Orange County	A	See comments on specific provisions below.	
4.	Magda Lopez ADR Administrator Superior Court of Contra Costa County	AM	See comments on specific provisions below.	
5.	Fariba Nourdjahan Pro Bono Panel Member Los Angeles Superior Court	A	See comments on specific provisions below.	
6.	Orange County Bar Association By John Hueston, President	AM	See comments on specific provisions below.	
7.	State Bar of California, Committee on Alternative Dispute Resolution	N/I	See comments on specific provisions below.	
8.	State Bar of California, Litigation Section, Rules and Legislation Committee	N/I	See comments on specific provisions below.	
9.	Superior Court of Monterey County	A	See comments on specific provisions below.	
10.	Superior Court of Riverside County	AM	See comments on specific provisions below.	
11.	Superior Court of Sacramento County	N/I	*The court has reviewed the proposal but does not have any comments to submit.	No response required.

**ITC number W11-01**

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

<b>List of All Commentators, Overall Positions on the Proposal, and General Comments</b>				
	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
12.	Superior Court of San Diego County	AM	See comments on specific provisions below.	
13.	Superior Court of San Luis Obispo County	A	The footnote on the form says “ADR-100 [Rev. July 1, 2012]”. But the explanation states that the Proposed Effective Date is January 1, 2012.	The committee is proposing that rule and form revisions be made effective July 1, 2012, to allow courts sufficient time for implementation.

<b>Rule 3.845 – Requiring that mediator statements and reports in general civil cases be submitted on form ADR-100</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
California Dispute Resolution Council	<p>We support making mediator reports of court-connected mediations uniform, which appears to be the general purpose of ADR-100 and the related rules proposals.</p> <p>*Changes that the California Dispute Resolution Council urges be made to specific provisions of the proposals are set forth below.</p>	No response required.
Contra Costa County Bar Association, Alternative Dispute Resolution Section	[T]he ADR Section believes that Form ADR-100 should not be required for day-of-trial resolution proceedings in general civil matters. Because most such day-of-trial proceedings are not voluntary and because local courts often view such proceedings as settlement conferences, such proceedings should not be deemed mediations and the filing of a Form ADR-100 should not be required.	<p>The committee agrees that the requirement to use form ADR-100 should apply only to mediations and not to settlement conferences, and believes this is clear from the proposed rule and form.</p> <p>Under proposed rule 3.835 and 3.845, the use of form ADR-100 would only be required when a mediator reports concerning the status or result of the mediation of a <i>general civil case</i>, as defined in rule 1.6 of the California Rules of Court, which excludes small claims, unlawful detainer, and civil harassment proceedings. The committee understands that day-of-trial mediations</p>

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<b>Rule 3.845 – Requiring that mediator statements and reports in general civil cases be submitted on form ADR-100</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
		are common in these proceedings, but rare in general civil cases. The committee concluded that the use of form ADR-100 should be required when mediators are required to report concerning the status or results of the mediation of a general civil case, even when that mediation occurs on the day of trial.
Orange County Bar Association	Provisions of the new rule 3.845 which mandate the use of an efficacious, standard form whenever a mediator is required to submit a statement or report to the court concerning the status or result of a mediation, are wholly supported.	No response required.

**Supplemental local forms (Rule 3.845).** The Invitation to Comment specifically requested input concerning the following questions:

1. Should the California Rules of Court provide that courts may, by local rule, require mediators to attach a supplemental form to ADR-100 provided the supplemental local form does not request any information that mediators are prohibited from disclosing under the mediation confidentiality provisions of Evidence Code sections 1115–1128?
2. If so, should the instructions on form ADR-100 indicate that the mediator may be required to attach a supplemental local form and should form ADR-100 include a check box for the mediator to indicate that a required supplemental local form is attached?

<b>Rule 3.845 and form ADR-100 – Allowing supplemental local forms</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
California Dispute Resolution Council	[P]roposed Rule 3.845 should not permit a court to adopt a local rule which requires a mediator to attach a supplemental	The committee has concluded that rule 3.845 should not allow courts to require mediators to attach a

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<b>Rule 3.845 and form ADR-100 – Allowing supplemental local forms</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>form to ADR-100 to provide "additional information" to the court.</p> <p>[This] provision poses several problems. Although the proposed rule states that the supplemental form should not contain confidential information otherwise prohibited by Evidence Code Sections 1115-1128, appellate decisions over the past several years, both published and not published, reveal differences of opinion about what is and is not protected by mediation confidentiality. Given this state of affairs, we believe the proposed rule invites courts to require information that arguably violates mediation confidentiality. This is particularly troublesome, since the proposed rule does not require that any supplemental form be kept separate from the court’s case file.</p> <p>In addition, allowing courts to require supplemental information conflicts with the objective of establishing a uniform reporting system. Allowing courts to require by local rule that supplemental forms with additional information be attached to ADR-100 opens the door to as many as 58 different reporting systems in the state.</p> <p>Thus, we believe that the second sentence and the phrase “and any supplemental local form” be deleted from proposed Rule 3.845 and that box 5 be deleted from proposed revised form ADR-100.</p> <p>If it is believed that gathering information for statistical</p>	<p>supplemental form to ADR-100. The committee has therefore removed this provision from proposed rule 3.845 and removed the related instructions and checkbox item from form ADR-100.</p> <p>The committee also concluded, and has added an Advisory Committee Comment to the proposed rule indicating, that courts may ask mediators to provide other information about court-program mediations on separate forms or surveys that do not request any information that will allow identification of a specific case or mediation participant and that will not become part of the court’s case file.</p>

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<b>Rule 3.845 and form ADR-100 – Allowing supplemental local forms</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	reporting purposes, for example, is desirable, we urge that the proposed rules be revised (a) to provide that no supplemental form or information may be required without previous approval by the Judicial Council and (b) to provide that any supplemental form be filed only with the court’s ADR administrator and be kept separate from the court’s case file. This would allow the Judicial Council to preserve the substance of uniformity, to insure that any supplemental information is not inconsistent with mediation confidentiality and to prevent “leakage” of supplemental information into case files.	
Contra Costa County Bar Association, Alternative Dispute Resolution Section	The ADR Section opposes the inclusion of Box 5, along with the introductory reference to supplemental forms that may be required by local rule. The information contained in the proposed ADR-100 appears sufficient to provide local courts with "consistent data about the use and results of court-connected mediation programs for general civil cases .... " The ADR Section is concerned that supplemental forms required by local rules may seek information inconsistent with mediation confidentiality statutes and decisions.	Please see the committee’s response to the comment of the California Dispute Resolution Council, above.
Al Glover	There is no need for the additional form to be used with ADR-100.	Please see the committee’s response to the comment of the California Dispute Resolution Council, above.
Magda Lopez	Agree that it is useful to allow supplemental local court forms.	Please see the committee’s response to the comment of the California Dispute Resolution Council, above.
Orange County Bar Association	[Provisions of rule 3.845] which allow a court to require a mediator to complete and attach a locally developed supplemental form to [form ADR-100], are strongly opposed. When originally proposed in the spring of 2010, the Civil and Small Claims Advisory Committee ("Committee") noted	Please see the committee’s response to the comment of the California Dispute Resolution Council, above.

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<b>Rule 3.845 and form ADR-100 – Allowing supplemental local forms</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>specific benefits associated with mandating the use of a standard reporting form. Among the four benefits cited, were the following three:</p> <ul style="list-style-type: none"><li>• Reducing uncertainty about the mediation programs and cases in which form ADR-100 must be filed, including uncertainty about whether there is a local form or procedure for mediators to inform the court about the status and results of mediation;</li><li>• Promoting consistency in the forms that California courts use for the same or similar purposes; and</li><li>• Helping to ensure that the information that mediators submit to courts in all mediation programs is consistent with the mediation confidentiality statutes.</li></ul> <p>Were a supplemental local form allowed, each of these benefits (three out of the four), would be undermined and largely abrogated and so, it would seem, the very idea and purpose of a standard form.</p> <p>The Committee notes that the current proposal's provision for a supplemental form is a departure from its 2010 spring proposal, and states that, "[t]his change was made in response to a comment that some courts ask [for] information that helps courts evaluate their mediation programs but that is not required on [the standard] form . . ." Information that might help a court evaluate a program is quite different, however, from that gathered by the standard form proposed for use, to wit, form ADR-100, which exists to report about only the status of a specific mediation. What is sought and reported here, is fact. Courts commonly request information more</p>	

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<b>Rule 3.845 and form ADR-100 – Allowing supplemental local forms</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>germane to their programs or to the general process, and some may not even seek to tie the information to a particular mediation. In this connection, mediators may be asked if the mediation should have occurred earlier or later in the litigation; if it reduced costs; if it preserved relationships; if the part understood the process; if counsel were prepared. What is sought and reported here, is opinion. In most programs utilizing form ADR-100, it is filed and becomes a public record. Opinion should not be made a part of this record and publicly available, particularly when possibly casting aspersions on the reputation of parties or counsel.</p> <p>Additionally, despite prohibitions in the proposed rule that the supplemental form not elicit any information that mediators are prohibited from disclosing, there will be no clearinghouse or review of a form's scope of inquiry to ensure its compliance in this regard. Further, the very scope of form ADR-100 is, and has repeatedly been, under scrutiny and revision. As form ADR-100 is seen by some as still pushing the envelope of confidentiality protection, it is difficult to conceive what information these contemplated supplemental forms would seek that would be factual enough to warrant public filing, yet be within the parameters of mediation confidentiality.</p>	
State Bar of California, Committee on Alternative Dispute Resolution	We oppose the current proposal to allow a local court to require by local rule that mediators attach a supplemental form to Form ADR-100 providing additional information. Even if the rule and the Form state that no confidential information may be provided, there is no certainty that the many local courts in California will interpret mediation confidentiality rules in a uniform manner so as to ensure the protection of confidential	Please see the committee’s response to the comment of the California Dispute Resolution Council, above.

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<b>Rule 3.845 and form ADR-100 – Allowing supplemental local forms</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>information.</p> <p>Accordingly, we urge that Rule 3.845 be amended to <i>preclude</i> any local court from requiring by local rule that any additional information about a mediation be submitted, and we recommend that the proposed Form ADR-100 be revised accordingly (i.e., revision of the form instructions and deletion of proposed item 5 checkbox).</p>	
State Bar of California, Litigation Section, Rules and Legislation Committee	<p>1. Yes, the committee believes that the California Rules of Court should provide that courts may, by local rule, require mediators to attach a supplemental form provided that it does not request any information that mediators are prohibited from disclosing.</p> <p>2. Yes, the committee believes that form ADR-100 should include instructions that the mediator may be required to attach a supplemental form and a box for the mediator to check indicating that a supplemental form is attached.</p>	Please see the committee’s response to the comment of the California Dispute Resolution Council, above.
Superior Court of Monterey County	The operative word is MAY require. The ADR 100 works for our programs so our court would like to continue use without creating an additional local form for use (assuming another round of modifications would occur as each court establishes and maintains better mediation programs for civil, small claims and harassment cases).	Please see the committee’s response to the comment of the California Dispute Resolution Council, above.
Superior Court of Riverside County	Form ADR-100, Item 5. Delete, or add: This supplemental form will not be filed and will not become part of the court file.	Please see the committee’s response to the comment of the California Dispute Resolution Council, above.
Superior Court of San Diego	Question 1:	Please see the committee’s response to the comment of

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<b>Rule 3.845 and form ADR-100 – Allowing supplemental local forms</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
County	<p>No. Currently, courts have the power to create local ADR forms to assist in their ADR program administration in accordance with California Rule of Court, rules 10.780 et seq. Consequently, there is no need to expressly include this provision in the proposed Rule 3.845.</p> <p>If the committee is inclined to include such a provision, however, courts should not be limited to requiring such a supplemental form “by local rule” since such a limitation could be interpreted to require courts to draft new local rules every time they created or revised a local ADR form, a process which would certainly thwart effective ADR program administration. In San Diego, for instance, local rules are created/revised on an annual basis, so any proposed revisions must be submitted almost a full year prior to their effective date -- a proposed revision with an effective date of January 2012 must be submitted for consideration in January 2011 and, if approved, would then have to be circulated for comment, etc.</p> <p>Question 2: Although a supplemental local ADR form should not be dependent upon a local rule (see response to Question 1, above), the inclusion of the language on ADR-100 that the mediator “may be required to attach a supplemental local form” is fine since it would serve to alert mediators to that possibility. However, the addition of a check-box indicating that such a local form is attached is unnecessary and may be confusing, especially in the event a court does not require a supplemental local form.</p>	the California Dispute Resolution Council, above.

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<b>Rule 3.845 and form ADR-100 – Allowing supplemental local forms</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>Suggested text revisions</p> <p><b><u>DELETE proposed section 5 check box regarding supplemental form:</u></b></p> <p>5. <del><input type="checkbox"/> A supplemental form required by local rule of court is attached.</del></p> <p><u>Reasoning:</u> Courts should not be limited to requiring such a supplemental form “by local rule” since such a limitation could be interpreted to require courts to draft new local rules every time they created or revised a local ADR form, a process which would certainly thwart effective ADR program administration. Moreover, the addition of a check-box indicating that such a local form is attached is unnecessary and may be confusing, especially in the event a court does not require a supplemental local form. See also, responses to Questions 1 and 2, above.</p> <p><b>Rule 3.845. Form of Mediator Statements and Reports</b>            If a mediator is required to submit a statement or report to the court concerning the status or result of the mediation, the statement or report must be submitted on the Judicial Council Statement of Agreement or Nonagreement (form ADR-100). A court may require <del>by local rule</del> [see response to question 1, above] that the mediator attach a supplemental form to ADR-100 that provides additional information, provided the supplemental form does not request any information that mediators are prohibited from disclosing under Evidence Code sections 1115–1128. The mediator’s completed form ADR-100 and any supplemental local form must not disclose the terms of</p>	

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<b>Rule 3.845 and form ADR-100 – Allowing supplemental local forms</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	any agreement or any other communications or conduct that occurred in the course of the mediation, except as allowed in Evidence Code sections 1115–1128.	

<b>Rule 3.895 – Miscellaneous Comments</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
Fariba Nourdjahan Pro Bono Panel Member Los Angeles Superior Court	It would help if more time is given to file the supplemental form. In the past or currently, the completion date set by the Court did not or does not allow the mediator to contribute effectively in resolving the cases since parties want to run discoveries on each, and it is hard for a mediator to draw a fair conclusion or facilitate the case not knowing all the facts of the case. I believe if the Court sets the mediation completion date very close to the trial date, it would make a lot of difference for the mediators to collaborate with parties in resolving the cases.	<p>The proposed amendment to rule 3.895 will permit courts to allow the mediator as much time to file an original or supplemental form ADR-100 as the court deems appropriate in any particular case. However, rule 3.896 (which this proposal would not amend) provides that Civil Action Mediation Program (CAMP) mediations must be completed within 60 days of a reference to a mediator, unless that time is extended by the court for up to 30 days on a showing of good cause.</p> <p>The 90 day time limit for completing CAMP mediations is intended to accomplish the legislative intent underlying this statewide mediation program. Code of Civil Procedure section 1775, which sets forth the Legislature’s findings and declarations provides, in part, “[m]ediation and similar alternative processes can have the greatest benefit for the parties in a civil action when used early, before substantial discovery and other litigation costs have been incurred.” (To promote this goal, rule 3.896 also provides that the parties should exercise restraint in discovery while a case is in</p>

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<b>Rule 3.895 – Miscellaneous Comments</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
		mediation.) However, the CAMP statutes do not preclude courts from implementing other mediation programs that allow completion closer to the date of trial, as the commentator suggests. (See Code Civ. Proc., §1775.13.)
Superior Court of San Diego County	<p><b>Rule 3.895. Filing of <i>Statement of Agreement or Nonagreement by mediator</i></b>            Within 10 days after conclusion of the mediation, or by another date set by the court, the mediator must complete, serve on all parties, and file a statement on <i>Statement of Agreement or Nonagreement</i> (form ADR-100), <del>advising the court of the status of the mediation, including whether the mediation ended in full agreement, partial agreement, or nonagreement as to the entire case or as to particular parties in the case and whether the case was resolved as to all parties. If the mediation has not ended when the report is filed, the mediator must file a supplemental form ADR-100 within 10 days after the mediation is concluded or by another date set by the court.</del>[Note: the content of the form speaks for itself and this additional narrative may serve to create unnecessary ambiguity.] The completed form ADR-100 and any supplemental local form must not disclose the terms of any agreement or any other communications or conduct that occurred in the course of the mediation, except as allowed in Evidence Code sections 1115–1128.</p>	<p>The committee agrees with the suggestion to delete the text, in current rule 3.895 and the proposed revisions, that describes the contents and purpose of form ADR-100.</p> <p>The committee concluded that the provision requiring the filing of a supplemental form ADR-100 when the mediation has not been completed should be retained in the proposal because these supplemental forms will help courts track and manage cases assigned to Civil Action Mediation.</p>

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**Form ADR-100, Item 2 – Reason a mediation did not take place**

Commentator	Comment	Committee Response
<p>California Dispute Resolution Council</p>	<p>First, the two subparts of box 2(b) should be deleted from proposed revised form ADR-100. These two subparts require that, if a mediation does not take place, a mediator must report why it did not, including whether a person who was ordered to appear at the mediation did not appear.</p> <p>One problem with these sub-parts is that they conflict with Evidence Code Section 1121, which prohibits reports by a mediator to the court "other than a report mandated by court rule or other law that states whether an agreement was reached."</p> <p>A further problem with the sub-parts is that failure to appear constitutes conduct, whether by a party, as in the present form, or by a person, as in the proposed form, and the California courts have held that a mediator is prohibited from reporting a party's conduct to a court. <i>Foxgate Homeowners Association v Bramalea California, Inc.</i>, (2001) 26 Cal 4th 1, 17; <i>Campagnone v Enjoyable Pools &amp; Spa Service &amp; Repairs, Inc.</i>, (2008) 163 Cal App 4th 566, 571. The sub-parts also conflict with proposed Rule 3.845, which would prohibit a mediator from disclosing any conduct that occurred in the course of the mediation.</p>	<p>Based on this comment and others, the committee recommends removing the subitems for mediators to indicate the reasons a mediation was not held from form ADR-100. Although the committee concluded that mediators can permissibly report some reasons a mediation was not held (including that a person who was required to attend did not attend), it also concluded that mediators often will not know or will not be permitted to report all of the information a court would require to determine the appropriate action to take. The committee therefore concluded that courts can best determine why a mediation was not held by requesting this information from the litigants.</p>
<p>Contra Costa County Bar Association, Alternative Dispute Resolution Section</p>	<p>The ADR Section recommends the elimination of Box 2.b(1) and Box 2.b.(2) in the proposed form (Draft Rev. 11-16-10) that address the reasons that a mediation did not take place. The ADR Section believes that to require a mediator to report to the court that, for example, a party who was ordered or required by rules to appear at a mediation and did not appear,</p>	<p>Please see the committee’s response to the comment of the California Dispute Resolution Council, above.</p>

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**Form ADR-100, Item 2 – Reason a mediation did not take place**

Commentator	Comment	Committee Response
	<p>constitutes reporting conduct that is not permitted under Evidence Code § 1121 and <i>Campagnone v. Enjoyable Pools &amp; Spas</i>, 168 Cal.App.4th 566, 77 Cal.Rptr.3d 551 (2008) and <i>Foxgate Homeowners Assn. v. Bramalea California, Inc.</i>, 26 Cal.4th I, 101 Cal.Rptr.2d 642 (1991), as discussed therein.</p> <p>The ADR Section suggests that a third choice be added to paragraph 2 that the mediation was scheduled, but settled prior to mediation. This box appears in the Alameda and Contra Costa County Superior Court Mediator's Report forms.</p>	<p>Revising the form to add an item for the mediator to indicate that a mediation was settled prior to mediation would be a substantive change that would need to be circulated for comment. The committee will consider whether to develop a proposal to add such an item in a future comment cycle.</p>
<p>Magda Lopez ADR Administrator, Superior Court of Contra Costa County</p>	<p>The sub-parts to question #2.b. on form ADR-100 are unclear and seem to be asking for information that mediators are not permitted to disclose per the "Foxgate" and "Campagnone" cases. Sub-parts should be deleted and question 2.b. should be re-written as follows:</p> <p style="text-align: center;">"2.b. was scheduled but settled before mediation."</p> <p>A sub-part "c" should be added as follows:</p> <p style="text-align: center;">"2.c. was scheduled but not held."</p>	<p>Please see the committee’s response to the comment of the California Dispute Resolution Council, above.</p>
<p>Orange County Bar Association</p>	<p>Item 2: The current proposal deletes subitems 5 .b. (1) and (2) from the revised form ADR-100, which subitems reported the type of partial agreement reached in the mediation. This deletion, which is wholly supported, is said to have been prompted by comments expressing “concerns that the subitems may potentially solicit or precipitate inquiries about</p>	<p>Please see the committee’s response to the comment of the California Dispute Resolution Council, above.</p>

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**Form ADR-100, Item 2 – Reason a mediation did not take place**

<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>information that is protected from disclosure by the mediation confidentiality statutes." How is it that these concerns do not extend to subitems which require reporting as to why a mediation did not take place? Unlike the evolved proposal of the Committee in the spring of 2010 which sought to delete these subitems 3.a. (1) and (2), which definitely elicit information certain to prompt inquiry, the current proposal retains them as subitems 2.b. (1) and (2).</p> <p>By checking the box at subitem 2.b. (1), a mediator indicates that a mediation did not take place because a participant did not appear. Clearly, if only in "fairness" to those who did appear, this will provoke the inquiry as to who it was that thwarted the mediation by their absence. This determination of "who" will then provoke the inquiry as to "why." And so it goes. If an absence was not the reason for non-occurrence, the mediator is to check the box at subitem 2.b.(2) for "[o]ther reason," and provide specifics. Short of something happening in the mediator's life which the neutral decides to divulge, it would seem difficult to specify a reason which does not constitute communication or conduct in conjunction with mediation. A mediator is said to be incompetent to testify about such things and consequently, they are considered within mediation confidentiality. [See Evidence Code sections 703.5 and 1119.] Without first securing the permission of a participant to disclose such, a mediator would be ill-advised to provide information as to an emergency, a health concern or nonpayment of an associated fee, all of which are circumstances a participant is not likely to want the opposition, or the world, to know about in a publicly filed document.</p>	

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**Form ADR-100, Item 2 – Reason a mediation did not take place**

Commentator	Comment	Committee Response
	<p>The inclusion of these subitems most certainly invites inquiry and seems to serve no other purpose than to find out who did what, which may indeed, even rise to the level of a court order violation. These determinations, however, are calculated to lead to the exaction of some penalty or recompense and so, fail to look forward, constitute a further obstacle to resolution, and are contrary to the very nature of the mediation process.</p>	
<p>State Bar of California, Committee on Alternative Dispute Resolution</p>	<p>The ADR Committee strongly urges the Judicial Council to delete proposed subitems 2(b)(1) and 2(b)(2) [subitems 3(b)(1) and 3(b)(2) in existing form ADR-100]. When a similar proposal to revise form ADR-100 was circulated for public comment in spring 2010, those subitems were removed from the form. The ADR Committee supported that decision, as originally contemplated in 2010 proposal. The Committee has no objection to the inclusion of Item 2(b), which requires the mediator to report that a mediation “was scheduled but not held” but these subitems require the mediator to disclose the <i>reasons</i> a mediation was “scheduled but not held.” Subitem 2(b)(1) allows the mediator to place a checkmark next to a box for the reason “<i>A person who was ordered or required by rule to appear at the mediation did not appear</i>” while subitem 2(b)(2) allows the mediator to place a checkmark next to a box for “<i>Other reason (please specify without disclosing any confidential information).</i>”</p> <p>The ADR Committee believes that requiring the mediator to communicate to the Court the information sought by these subitems violates the mediator confidentiality rules that are codified in California Evidence Code Sections 1119(c) and</p>	<p>Please see the committee’s response to the comment of the California Dispute Resolution Council, above.</p>

**ITC number W11-01**

**Alternative Dispute Resolution (ADR): Mediator’s Statement of Agreement or Nonagreement and Statistical Reports to Judicial Council** (Adopt Cal. Rules of Court, rules 3.835 and 3.845; amend rule 3.895; repeal rule 3.897; revise form ADR-100)

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**Form ADR-100, Item 2 – Reason a mediation did not take place**

Commentator	Comment	Committee Response
	<p>1121. <i>See Cassel v. Superior Court</i>, S178914 (California Supreme Court, January 13, 2011) (discussing the Supreme Court’s conclusion in <i>Foxgate Homeowners’ Assn. v. Bramalea California, Inc.</i> (2001) 26 Cal.4th 1, 17):</p> <p style="padding-left: 40px;">“[U]nder the confidentiality provisions of section 1119, and under section 1121, which strictly limits the content of mediators’ reports, a mediator may not submit to the court, and the court may not consider, a report of communications or conduct by a party which the mediator believes constituted a failure to comply with an order of the mediator and to participate in good faith in the mediation process...Even if the failure to allow such a report means there is no sanction for a parties’ refusal to cooperate during the mediation, [the Supreme Court] observed, ‘the Legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the mediation process.’ ”</p> <p>Should the Judicial Council adopt our recommendation to delete the subitems, we have no objection to Rule 3.895’s requirement that Form ADR-100 must be filed with the Court. To the extent the Judicial Council decides not to adopt our recommendation, we urge, in order to protect from further disclosure the confidential information provided by subitems</p>	

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**Form ADR-100, Item 2 – Reason a mediation did not take place**

Commentator	Comment	Committee Response
	<p>2(b)(1) and 2(b)(2), that the requirement of filing Form ADR-100 with the Court be deleted from Rule 3.895 and the Form ADR-100 instructions, and instead, that the Rule and form instructions require submission to the Court’s ADR Administrator, or in the absence of an ADR administrator, require lodging the Form with the Court.</p>	
<p>Superior Court of Riverside County</p>	<p><b>2a. The mediation was not scheduled: <u>Delete or amend.</u></b></p> <p>This question could be very helpful to court staff if it provided possible reasons, as is done in 2b. If reasons were provided, the SAN could automatically trigger the next hearing without need for court staff to contact self-represented parties, attorneys and/or mediators to find out why the mediation wasn’t scheduled. Asking the mediator for the following information does not interfere with mediation confidentiality, does not burden mediators and would make court-connected mediation programs and civil departments more efficient.</p> <p><b>2. The mediation</b></p> <p><b>a. was not scheduled (check one):</b></p> <p>(1) <u>A person who was ordered or required by rule to schedule the mediation did not schedule the mediation.</u> (With this information, an OSC re failure to complete mediation could be automatically set.)</p> <p>(2) <u>The case settled or was dismissed before the mediation was scheduled.</u> (With this information, an OSC re dismissal could be automatically set. Although parties are required to timely submit a Notice of Settlement or Notice of Dismissal, they often do not, and this information would allow court staff to keep</p>	<p>Based upon the concerns that commentators have expressed about retaining subitems for mediators to indicate the reason a mediation was not held, the committee does not recommend adding subitems for the mediator to indicate the reason a mediation was not scheduled.</p>

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**Form ADR-100, Item 2 – Reason a mediation did not take place**

Commentator	Comment	Committee Response
	<p>the case moving in the appropriate direction regardless of delay by parties.)</p> <p>(3) <u>Other reason (please specify without disclosing any confidential information).</u></p> <p>b. <u>  </u> was scheduled but not held (check one):  <b>Add</b>  <b>(2) <u>The case settled before the mediation was held.</u></b></p> <p>This addition would be so very helpful to court staff and would make court-connected mediation programs and civil departments more efficient, as described above. Stating that a case settled before mediation took place should not interfere with mediation confidentiality.</p>	
<p>Superior Court of San Diego County</p>	<p><b><u>DELETE subsections b(1) and b(2):</u></b></p> <p>2. The mediation (check one)</p> <p>a. <input type="checkbox"/> was not scheduled.</p> <p>b. <input type="checkbox"/> was scheduled but not held. <del>(check one).</del></p> <p><del>_____ (1) <input type="checkbox"/> A person who was ordered or required by rule to appear at the mediation did not appear.</del></p> <p><del>_____ (2) <input type="checkbox"/> Other reason (please specify without disclosing any confidential information):</del></p> <p><u>Reasoning:</u> The San Diego Superior Court’s ADR Office does not currently track the reason(s) provided, if any, and mediators often leave that section of the current form blank in order to avoid the possible disclosure of confidential information. Evidence Code section 1121 expressly limits a mediator’s report to the court to “whether an agreement was reached,</p>	<p>Please see the committee’s response to the comment of the California Dispute Resolution Council, above.</p>

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**Form ADR-100, Item 2 – Reason a mediation did not take place**

Commentator	Comment	Committee Response
	<p>unless all parties to the mediation expressly agree otherwise in writing or orally...” Requesting the information in (b)(1) and (b)(2) places mediators in an unnecessarily precarious position, in addition to being unsupported by statute and the ever-evolving case law regarding mediation confidentiality.</p> <p>In <i>Cassel v. Superior Court</i> (1/13/11) 2011 DJDAR 658, the most recent California case addressing mediation confidentiality, the Supreme Court discussed that it previously concluded in <i>Foxgate Homeowners’ Assn. v. Bramalea California, Inc.</i> (2001) 26 Cal.4<sup>th</sup> 1, 17:</p> <p>“...[U]nder the confidentiality provisions of section 1119, and under section 1121, which strictly limits the content of mediators’ reports, a mediator may not submit to the court, and the court may not consider, a report of communications or conduct by a party which the mediator believes constituted a failure to comply with an order of the mediator and to participate in good faith in the mediation process...Even if the failure to allow such a report means there is no sanction for a parties’ refusal to cooperate during the mediation, [the Supreme Court] observed, ‘the Legislature has weighed and balanced the policy that promotes effective mediation by requiring confidentiality against a policy that might better encourage good faith participation in the mediation process.’”</p>	

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**Form ADR-100, Item 2 – Reason a mediation did not take place**

Commentator	Comment	Committee Response
	[See also, <i>Campagnone v. Enjoyable Pools &amp; Spas Service and Repairs, Inc.</i> (2008) 163 Cal.App.4 <sup>th</sup> 566.]	

**Form ADR-100, Item 3 – Type of partial agreement**

Commentator	Comment	Committee Response
Orange County Bar Association	*The commentator “wholly supports” deleting the subitems from current form ADR-100 and the spring 2010 proposal that pertain to the type of partial agreement reached in mediation.	No response required.

**Form ADR-100 – Other comments**

Commentator	Comment	Committee Response
Orange County Bar Association	<p>In General: Based on the language of the proposed amendment to rule 3.895, to the extent information requested by form ADR-100 only pertains to CAMP mediations, it is suggested that this be flagged for a mediator completing the form. Per the proposed amendment I this would appear to involve any check box, notice or information potentially requested on the form, pertaining to the filing of a supplemental form ADR-100.</p> <p>Caption and Instruction Boxes: As to form ADR-100 I as well as, in the proposed rules relating to reporting forms there may be confusion in completing a form and providing the desired information due to the often and repeated use of the term</p>	<p>The committee has revised the instruction in item 4, regarding the filing of a supplemental form ADR-100, substantially as suggested by the commentator.</p> <p>The committee believes any concern about the use of the word “supplemental” in different contexts has been resolved by deleting the provisions relating to supplemental local forms from the proposal.</p>

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<b>Form ADR-100 – Other comments</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
	<p>"supplemental." Rules 3.845 and 3.895 and form ADR-100 use "supplemental" in referring to the potential local form to be attached to the ADR 100, and in referring to the standard form to be filed following a previously filed form ADR-100. It is suggested that another designation for one of these forms be used, should the use of both be adopted.</p> <p>* **</p> <p>Items 3 and 4: The Committee is urged to consider the impact which completion of Items 3 and 4 as currently proposed might have on confidentiality, in light of Evidence Code section 1125 and the express methods by which a mediation "ends" or is said to be terminated. Completion of Item 3 may lead some participants to believe that mediation and confidentiality have ended, while others, in light of the concurrent completion of Item 4, might believe the mediation and protections are on-going. This opportunity for confusion might create some hazard in connection with setting additional sessions, particularly given the provisions of rule 3.852(2) whereby in court-connected mediation, the definition of "mediator" departs from the definition in Evidence Code section 1115(b), in that it does not include persons designated by the mediator to assist in the mediation or to communicate with a participant in preparation for a mediation. It is suggested that the language in Item 3 be clarified to better express the circumstances existing in connection with a mediation yet completed, that Item 4 be eliminated and subitems be included within an expanded Item 3 to cover such circumstances, or that instructions be included which direct a mediator to complete either Item 3 or 4, as appropriate, but not both.</p>	

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<b>Form ADR-100 – Other comments</b>		
<b>Commentator</b>	<b>Comment</b>	<b>Committee Response</b>
Superior Court of Riverside County	<p>Item 2c. Delete #2: Asking both (1) &amp; (2) is annoying and burdensome to mediators and does not provide useful information to the court or ADR department.</p> <p>Item 3. Agree</p> <p>Item 4a &amp; b: Delete. The mediator’s speculation about the mediation completion date and the date for the next mediation session do not belong on a filed form and may cause confusion concerning the completion date ordered by the court, completion dates the mediator anticipates, and proposed dates for actual mediation sessions still being discussed among the parties.</p> <p>“Notice to Parties” Agree. This notice is very important and will help avoid confusion among various mediation and mediation completion dates, especially if 4a &amp; 4b are not deleted.</p>	<p>The committee concluded that it may be useful to have mediators report the number of sessions as an integer, as well as the dates of the sessions, so the number or sessions can readily be captured and reported in case management systems. And, the committee does not think it is a significant burden for the mediator to provide the number, as well as the dates, of mediation sessions.</p> <p>The committee concluded that it is important to capture the anticipated completion date of the mediation, so that courts can track the date when a supplemental form ADR-100 should be submitted and for other case management purposes.</p> <p>No response required.</p>
Superior Court of San Diego County	<p><b><u>REVISE instructions on top of form:</u></b></p> <p>“The mediator must complete, serve and file this form and any supplemental form required by <del>local rule of the</del> <u>court</u>.”</p> <p><u>Reasoning:</u> This form is currently submitted to the San Diego Superior Court’s ADR Offices. Since the form is used for mediation program evaluation, service on the parties would place an unnecessary burden on the mediators.</p>	<p>The commentator’s concern about the local rule provision has been addressed by deleting the provisions regarding supplemental local forms.</p> <p>The committee concluded that the mediator should serve form ADR-100 on the parties, as well as file it with the court, so the parties can notify the court if they disagree with the information the mediator has provided in the form.</p>