

Invitation to Comment

<p>Title</p>	<p>Alternative Dispute Resolution: Procedures for Addressing Complaints About Court-Program Mediators for Civil Cases (renumber rules 3.870–3.878 of the California Rules of Court as rules 3.880–3.888, respectively; amend and renumber rules 3.865, 3.866, 3.867, and 3.868 as rules 3.866, 3.870, 3.869, and 3.877, respectively; adopt rules 3.865, 3.867, 3.668, and 3.871–3.876; amend rule 10.780; and revise form ADR-107)</p>
<p>Summary</p>	<p>The amended and new rules would establish a statewide procedure for addressing complaints about court-program mediators for civil cases. The amended rules would also provide that inclusion on a court list or panel of alternative dispute resolution neutrals is a revocable privilege. The revisions to form ADR-107 would shorten and simplify this optional attendance sheet for court-program mediations of civil cases.</p>
<p>Source</p>	<p>Civil and Small Claims Advisory Committee Hon. Lee Smalley Edmon, Chair</p> <p>Subcommittee on Alternative Dispute Resolution Hon. Ignazio J. Ruvolo, Chair</p>
<p>Staff</p>	<p>Alan Wiener, 818-558-3051, alan.wiener@jud.ca.gov</p>
<p>Discussion</p>	<p><u>Background</u> The Judicial Council encourages superior courts to establish mediation programs for civil cases. (See Standards of Judicial Administration, standard 10.70(a).) Many courts refer or order cases to mediation, maintain panels of mediators, provide lists of mediators to litigants, or refer cases to specific mediators.</p> <p>Mediators are not certified or licensed by the Judicial Council or the State of California. To promote public confidence in court-connected mediation programs for civil cases, the Judicial Council has adopted rules of court governing the conduct of mediators in these programs. (Cal. Rules of Court, rule 3.850 et seq.) Under rule 3.865, the Judicial Council also requires superior courts that make lists of mediators available to litigants in general civil cases, or that recommend, select, appoint, or compensate mediators in these cases, to establish procedures for receiving, investigating, and resolving complaints about those mediators. Rule 3.865 provides that the court may reprimand a mediator, require a mediator to complete additional training, or remove a mediator from the court’s panel or list or otherwise prohibit a mediator from receiving future mediation referrals from the court if the mediator fails to comply with rule 3.850 et seq.</p>

A proposal that was circulated for public comment in 2005 aimed to help ensure that superior court procedures for resolving complaints about mediators under rule 3.865 would be consistent with and preserve the confidentiality of mediation communications established by Evidence Code sections 703.5 and 1115 et seq.¹ Many comments submitted by members of the mediation community in response to that proposal suggested that the Judicial Council should adopt a statewide procedure for addressing complaints about court-program mediators, or suggested elements that should be included in mediator complaint procedures.

The proposed statewide complaint procedure was developed in response to these suggestions, with guidance and assistance from a working group that included representatives of the ADR Subcommittee, court and noncourt ADR program administrators, mediation trainers, and mediators who serve in court-mediation programs and conduct private mediations.

Statewide Complaint Procedure

The texts of the new and amended rules that would establish a statewide complaint procedure are attached at pages 8–19. Key provisions of the rules are summarized below.

Overview

The statewide complaint procedure and related provisions would be set forth in rules 3.865–3.877 of the California Rules of Court. Current rules 3.865–3.868, which require and relate to local complaint procedures, would be renumbered, amended, and incorporated within the new statewide procedure. Current rules 3.871–3.878 would be renumbered to accommodate the statewide procedure.

The statewide procedure would establish a general framework for resolving complaints about mediators, while preserving some flexibility for courts to address complaints in a manner that is best

¹ The 2005 proposal resulted in the Judicial Council’s adoption of rules 3.860, 3.866, 3.867, and 3.868 (former rules 1621, 1622.1, 1622.2, and 1622.3) effective January 1, 2006. Those rules are designed to preserve mediation confidentiality and to protect its underlying purposes when courts receive and address complaints about court-program mediators by: (1) establishing the confidentiality of these complaint procedures; (2) prohibiting persons who participated in or received information about a complaint procedure from subsequently adjudicating related disputes; and (3) aiding courts in obtaining the mediation participants’ agreement to disclosure of mediation communications in complaint procedures.

suitable to their size, organizational structure, and mediation program characteristics. It would also encourage early and informal resolution of complaints.

The procedure would include four potential stages. First, a Complaint Coordinator in each court would conduct a preliminary review of any complaint, which could include communication with the complainant. For complaints not resolved at this stage, the coordinator would conduct a preliminary inquiry that includes communication with the mediator. Complaints not resolved at the preliminary review or preliminary inquiry stage would be referred to a court's Complaint Committee to conduct an investigation. The Complaint Committee's report and recommendation would be submitted to the presiding judge or another judge or committee designated by the presiding judge to determine the final disposition of the complaint.

Purpose and application

Rule 3.865 would state the complaint procedure's purpose of promoting the resolution of complaints about mediators in court-connected mediation programs for civil cases in a manner that is respectful and fair to the complainant and the mediator, and consistent with the California mediation confidentiality statutes.

Rule 3.866 would provide that the procedure applies to superior courts that make a list of mediators available to litigants in general civil cases or that recommend, select, appoint, or compensate a mediator to mediate a general civil case. These courts would be required to follow this complaint procedure in addressing communications indicating that a mediator has or may have violated a provision of rule 3.850 et seq. The rules would not limit a court's authority to use different procedures for ensuring the quality of mediators who serve in its program in other contexts.

General requirements and confidentiality of complaint procedures

Rule 3.868 would set forth general requirements that courts process complaints promptly; maintain a file showing each complaint and its disposition for a period of five years; acknowledge complaints; and inform the complainant of the disposition. Subdivision (a) would encourage courts to resolve complaints using the simplest, least formal procedure that is suitable. An advisory committee comment would explain that hearings and testimony are rarely necessary to resolve complaints and increase the risk that complaint procedures may violate the mediation confidentiality statutes.

Rule 3.869 would set forth the confidentiality of complaint procedures, information, and records, and the circumstances under which these may be disclosed, as currently provided in rule 3.867, largely without substantive change. A provision would be added to subdivision (b), indicating that courts should consider requesting attendance sheets from the mediator and requesting the mediation participants' agreement to the disclosure of mediation communications if it appears that such disclosure may be necessary or helpful to resolve the complaint. New text in the advisory committee comment would explain that this is the most certain way to ensure that the disclosure of mediation communications in a complaint procedure does not violate the mediation confidentiality statutes. A revision to subdivision (d) would also delay the current authority (of the presiding judge or his or her designee) to authorize the disclosure of information and records about the complaint procedure that do not reveal mediation communications until after the final decision on a complaint.

Receiving complaints, preliminary review and inquiry, and initiating an investigation

Rule 3.870(a) would continue the requirement of current rule 3.866 that the presiding judge appoint a person who is knowledgeable about mediation to receive complaints about mediators who are subject to rule 3.850 et seq., and would identify this person as the Complaint Coordinator. Subdivision (b) would provide that complaints should be presented or referred to the coordinator. Subdivision (c) would provide that, if a complaint is not in writing, the coordinator must offer to help the complainant prepare a written complaint and, if the complainant declines, prepare a memorandum that includes the substance of the complaint and any other relevant information necessary to process it.

Rule 3.871(a) would require the Complaint Coordinator to conduct a preliminary review of each complaint and would permit the coordinator to communicate with the complainant to clarify the complaint or to provide information that may address the complainant's concern. The coordinator would be authorized to close the complaint following the preliminary review if it: (A) is withdrawn by the complainant; (B) lacks sufficient merit to proceed further; or (C) does not indicate that any violation of the rules of conduct may have occurred.

Rule 3.871(b) would require the Complaint Coordinator to conduct a preliminary inquiry concerning any complaint that is not resolved

through the preliminary review. At this stage, the coordinator would be required to inform the mediator of the receipt and nature of the complaint and to give the mediator an opportunity to respond. The complaint could be closed at this stage if: (A) it is found to be lacking in merit or trivial in nature; (B) an acceptable explanation is provided by the mediator; or (C) the complainant, the mediator and the Complaint Coordinator agree on a resolution.

Rule 3.872 would require the Complaint Coordinator to refer any complaint that is not resolved as a result of the preliminary review or the preliminary inquiry to a Complaint Committee for investigation. It would also permit the coordinator to initiate a complaint and refer it to the Complaint Committee based on information received from any source indicating that a mediator may have violated a rule of conduct set forth in rule 3.850 et seq.

Investigation and recommendation by Complaint Committee

Rule 3.873(a) would require that the presiding judge appoint a Complaint Committee that includes at least one person with experience as a mediator to investigate and make recommendations concerning any complaint that is referred or initiated by the Complaint Coordinator. An advisory committee comment would clarify that the Complaint Committee could be appointed on an ongoing or a case-by-case basis.

Subdivision (b) would require the Complaint Committee to give the mediator a copy of the complaint, a list of any violations that it appears may have occurred, and an opportunity to respond. The manner in which the committee conducts its investigation would not otherwise be specified in the rule.

Subdivision (c) would require the Complaint Committee to prepare a report that summarizes its investigation and includes a recommendation concerning the disposition of the complaint. The subdivision would authorize, but not require, the committee to inform the mediator of its recommendation and inquire whether the mediator accepts that recommendation. If the committee does so and the mediator accepts the recommendation, the committee's report would be required to include this information.

Final decision, permissible dispositions, and interim suspension

Rule 3.874 would provide that the presiding judge is responsible for making the final decision on the complaint or for appointing another

judge or a committee, other than the Complaint Committee, to perform this function. The final decisionmaker could adopt the Complaint Committee's recommendation, either by notifying the Complaint Coordinator of this or by taking no action within 30 days after the Complaint Committee's recommendation was forwarded to it. After giving due consideration to the Complaint Committee's recommendation, the final decisionmaker could also direct a different disposition by submitting this decision to the Complaint Coordinator in writing within 30 days. In either event, the Complaint Coordinator would be required to notify the mediator and the complainant of the final decision.

Rule 3.875 would set forth the permissible dispositions of a complaint, if it appears that the mediator has violated the rules of conduct set forth in rule 3.850 et seq. These dispositions are substantially the same as under current rule 3.865(b). They consist of admonishing or reprimanding the mediator, requiring additional mediation training, or removing the mediator from the court's panel or list or otherwise prohibiting the mediator from receiving future mediation referrals from the court. Two minor changes are the addition of admonishment (to supplement or explain reprimand) and clarification that additional training can be required only as a condition of remaining on the court's list or panel.

Rule 3.876 would permit the presiding judge or other final decisionmaker appointed under rule 3.874(a) to suspend a mediator pending the final disposition of a complaint, on recommendation of the Complaint Coordinator or the Complaint Committee, if it appears that the mediator may pose a threat of harm to mediation participants or to the integrity of the court's mediation program.

Related changes

Current rule 3.868, which disqualifies persons who participated in or received information about a complaint procedure from subsequently serving as an adjudicator in related matters, would be renumbered as rule 3.877. A minor substantive amendment would make this rule inapplicable to a person who received only information about a complaint procedure that was publicly disclosed under rule 3.869(d) (current rule 3.867(d)).

A new subdivision (c) would be added to rule 10.781, which currently includes requirements for inclusion on court lists of ADR neutrals. This would provide that inclusion on such court lists, and eligibility to

be recommended, appointed, or compensated by the court to serve as a neutral, are revocable privileges and confer no vested right on the neutral.

Form ADR-107

Attendance Sheet for Court-Program Mediation of Civil Case (form ADR-107) would be modified to include a space at the top of the form for the date of the mediation sessions. The bottom of the form would be reformatted to make it easier to complete, a check box to indicate the attachment of additional pages would be added, and the spaces for additional participant information on the reverse side of the form would be deleted to make this a one-page form. The revised form is attached at page 20.

1 Rules 3.870, 3.871, 3.872, 3.873, 3.874, 3.875, 3.876, 3.877, and 3.878 of the
2 California Rules of Court would be renumbered as rules 3.880, 3.881, 3.882, 3.883,
3 3.884, 3.885, 3.886, 3.887, and 3.888, respectively; rule 3.865 would be amended and
4 renumbered as rule 3.866; rule 3.866 would be amended and renumbered as rule
5 3.870; rule 3.867 would be amended and renumbered as rule 3.869; rule 3.868 would
6 be amended and renumbered as rule 3.877; rules 3.865, 3.867, 3.668, 3.871, 3.872,
7 3.873, 3.874, 3.875 and 3.876 would be adopted; rule 10.780 would be amended; and
8 Form ADR-107 would be revised, effective January 1, 2008, to read:

9
10
11 **Article 3. Procedures for Addressing Complaints About Mediators in Court-**
12 **Connected Mediation Programs for Civil Cases**

13
14 **Rule 3.865. Purpose**

15
16 These rules are intended to promote the resolution of complaints about mediators in
17 court-connected mediation programs for civil cases. They are intended to help courts
18 promptly resolve any such complaints in a manner that is respectful and fair to the
19 complainant and the mediator, and consistent with the California mediation
20 confidentiality statutes. Complaint procedures that satisfy these goals are important to
21 ensure the quality of court mediation panels and public confidence in the mediation
22 process and the courts.

23
24
25 **Rule 3.8663.865 Complaint procedure. Application**

26
27 **(a) ~~Court procedures required~~ Application to courts**

28
29 The rules in this article apply to each superior court that makes a list of mediators
30 available to litigants in general civil cases or that recommends, selects, appoints, or
31 compensates a mediator to mediate any general civil case pending in ~~the~~ that court.
32 must establish procedures for receiving, investigating, and resolving complaints that
33 mediators who are on the court's list or who are recommended, selected, appointed,
34 or compensated by the court failed to comply with the rules for conduct of
35 mediators set forth in this article, when applicable.

36
37 **(b) ~~Actions court may take~~**

38
39 The court may impose additional mediation training requirements on a mediator,
40 reprimand a mediator, remove a mediator from the court's panel or list, or otherwise
41 prohibit a mediator from receiving future mediation referrals from the court if the
42 mediator fails to comply with the rules of conduct for mediators in this article, when
43 applicable.

1 **(b) Application to complaints**

2
3 Superior courts must follow the procedures in this article when receiving,
4 investigating, and resolving complaints about mediators who are required to comply
5 with article 2.

6
7 **Advisory Committee Comment**

8
9 **Subdivision (b).** The procedures in this article apply to the resolution of complaints, as defined in rule 3.867(2), and
10 do not limit a court’s authority to use different procedures for ensuring the quality of mediators who serve in its
11 program in other contexts.

12
13 *DRAFTER’S NOTE: The actions that a court may take under these rules, which are currently set forth in*
14 *rule 3.865(b), are set forth in proposed rule 3.875.*

15
16
17 **Rule 3.867. Definitions**

18
19 As used in this article, unless the context or subject matter requires otherwise:

- 20
21 (1) “Article 2” means rules 3.850 through 3.859 of the California Rules of Court.
22
23 (2) “Complaint” means a written or oral communication made to the court’s Complaint
24 Coordinator indicating that a mediator has or may have violated a provision of
25 article 2.
26
27 (3) “Complainant” means the person who makes or presents a complaint.
28
29 (4) “Complaint Coordinator” means the person designated by the presiding judge under
30 rule 3.870(a) to receive complaints about the conduct of mediators.
31
32 (5) “Complaint Committee” means the committee appointed by the presiding judge
33 under rule 3.873(a) to investigate and make recommendations concerning
34 complaints.
35
36 (6) “Complaint procedure” means any process under this article to present, review,
37 respond to, investigate, or act upon any complaint.
38
39 (7) “Mediation communication” means any statement that is made or any writing that is
40 prepared for the purpose of, in the course of, or pursuant to a mediation or a
41 mediation consultation, as defined in Evidence Code section 1115, and includes any
42 communications, negotiations, and settlement discussions between participants in
43 the course of a mediation or a mediation consultation.
44
45

1 **Rule 3.868. General requirements**

2
3 **(a) Promptness and informality**

4
5 The court must process complaints promptly at all stages. The court should try to
6 resolve complaints using the simplest, least formal procedures that are appropriate
7 for the complaint.

8
9 **(b) Complaint records**

10
11 The court must maintain a file showing each complaint and its disposition for a
12 period of at least five years following the final disposition.

13
14 **(c) Communicating with complainant**

15
16 (1) The court must promptly send the complainant written acknowledgment that it
17 has received the complaint. The acknowledgement must provide the Internet
18 address at which the rules of conduct for mediators and these complaint
19 procedures can be obtained and offer to provide these materials upon request.

20
21 (2) The court must notify the complainant promptly in writing of the disposition of
22 the complaint.

23
24 **Advisory Committee Comment**

25
26 Subdivision (a). Many complaints about mediators can be respectfully and appropriately resolved at an early stage
27 of the complaint process, through informal discussions between court ADR program staff, the complainant, and the
28 mediator. For example, some complaints may arise from a misunderstanding of the mediator’s role or from behavior
29 that would not violate the standards of conduct. These types of complaints might appropriately be addressed by
30 providing the complainant with additional information or by informing the mediator that certain behavior was
31 upsetting to a mediation participant. Formal hearings and testimony are rarely necessary to appropriately resolve
32 complaints and they increase the possibility that the mediation confidentiality statutes may be violated. (See Evid.
33 Code sections 703.5 and 1119(a) and (b).)

34
35
36 **Rule–3.8693.867. Confidentiality of complaint procedures, information, and records**

37
38 **(a) Intent** ~~This rule’s requirement that rule 3.865 complaint procedures be confidential~~
39 ~~is~~

40
41 The requirements of this rule are intended to:

42
43 (1) Preserve the confidentiality of mediation communications as required by
44 Evidence Code sections 1115–1128;

- 1 (2) Promote cooperation in the reporting, investigation, and resolution of
2 complaints about mediators on court panels; and
3
4 (3) Protect mediators against damage to their reputations that might result from
5 disclosure of unfounded complaints against them.
6

7 **(b) Preserving confidentiality of mediation communications**
8

9 (1) All complaint procedures for receiving, investigating, and resolving inquiries
10 or complaints about the conduct of mediators must be designed and conducted
11 in a manner that to preserves the confidentiality of mediation communications,
12 including but not limited to the confidentiality of any communications
13 between the mediator and individual mediation participants or subgroups of
14 mediation participants.
15

16 (2) If it appears that the disclosure of mediation communications may be
17 necessary or helpful to resolve a complaint, the complaint coordinator or the
18 complaint committee should consider requesting:
19

20 (A) That the mediator submit the attendance sheet required by rule 3.860(a);
21 and
22

23 (B) The mediation participants' written consent to the disclosure of
24 mediation communications in the complaint procedure.
25

26 **(c) Confidentiality of complaint procedures**
27

28 All communications, inquiries, complaints, investigations, procedures, deliberations,
29 and decisions about the conduct of a mediator under rule 3.865 complaint
30 procedures must occur in private and must be kept confidential. No information or
31 records concerning the receipt, investigation, or resolution of an inquiry or a
32 complaint under rule 3.865 may be open to the public or disclosed outside the
33 course of the rule 3.865 complaint procedure except as provided in (d) or as
34 otherwise required by law.
35

36 **(d) Authorized disclosures**
37

38 After the final decision on a complaint, the presiding judge, or a person designated
39 by whom the presiding judge for this purpose designates to do so, may, in his or her
40 discretion, authorize the disclosure of information or records concerning rule 3.865
41 the complaint procedures that do not reveal any mediation communications,;
42 including The disclosures that may be authorized under this section include the
43 name of a mediator against whom action has been taken under rule 3.865 3.875, the

1 action taken, and the general basis on which the action was taken. In determining
2 whether to authorize the disclosure of information or records under this subdivision,
3 the presiding judge or designee should consider the purposes of the confidentiality
4 of ~~rule 3.865~~ complaint procedures stated in (a)(2) and (a)(3).

5
6 **(e) Disclosures required by law**

7
8 In determining whether the disclosure of information or records concerning ~~rule~~
9 ~~3.865~~ complaint procedures is required by law, courts should consider the purposes
10 of the confidentiality of ~~rule 3.865~~ complaint procedures stated in (a). Before the
11 disclosure of information or records concerning a complaint ~~procedures under rule~~
12 ~~3.865~~ is ordered, notice should be given to any person whose mediation
13 communications may be revealed.

14
15 **Advisory Committee Comment**

16
17 See Evidence Code sections 1115 and 1119 concerning the scope and types of mediation communications protected
18 by mediation confidentiality.

19
20 **Subdivision (b).** Regarding subdivision (b)(1), private meetings, or “caucuses,” between a mediator and subgroups
21 of participants are common in court-connected mediations, and it is frequently understood that these
22 communications will not be disclosed to other participants in the mediation. (See Cal. Rules of Court, rule 3.854(c).)
23 It is important to protect the confidentiality of these communications in ~~rule 3.865~~ complaint procedures; so that one
24 participant in the mediation does not learn what another participant discussed in confidence with the mediator.

25
26 Regarding subdivision (b)(2), the most certain way of ensuring that the disclosure of mediation communications in a
27 complaint procedure does not violate the confidentiality statutes is to obtain all of the mediation participants’ written
28 agreement to the disclosure. (See Evidence Code section 1122(a)(1).) Rule 3.860(a) requires mediators conducting
29 court program mediations to request that all mediation participants provide their contact information on an
30 attendance sheet and to submit the sheet to the court on request, to assist courts in obtaining the participants’
31 agreement to disclosure if this is considered necessary or beneficial in conducting a complaint procedure.

32
33 **Subdivisions (c)–(e).** The provisions of (c)–(e) that authorize the disclosure of information and records related to
34 ~~rule 3.865~~ complaint procedures do not create any new exceptions to mediation confidentiality. Information and
35 records about ~~rule 3.865~~ complaint procedures that would reveal mediation communications should ~~only~~ be publicly
36 disclosed only as consistent with the statutes and case law governing mediation confidentiality.

37
38 Evidence Code sections 915 and 1040 establish procedures and criteria for deciding whether information acquired in
39 confidence by a public employee in the course of his or her duty is subject to disclosure. These sections may be
40 applicable or helpful in determining whether the disclosure of information or records acquired by judicial officers,
41 court staff, and other persons ~~while receiving, investigating, or resolving complaints under rule 3.865 in the course~~
42 of a complaint procedure is required by law or should be authorized in the discretion of the presiding judge.

1 **Rule 3.8703.866. Receiving Designation of person to receive inquiries and**
2 **complaints**

3
4 **(a) Designation of Complaint Coordinator**

- 5
6 (1) In each superior court that is required to establish a complaint procedure under
7 rule 3.865, The presiding judge must designate a person Complaint
8 Coordinator who is knowledgeable about mediation to receive and coordinate
9 the investigation of any inquiries or complaints about the conduct of mediators
10 who are subject to rule 3.865 article 2. The ADR Administrator appointed
11 under rule 10.783(a) may also be appointed as the Complaint Coordinator if
12 that person is knowledgeable about mediation.
- 13
14 (2) The court must make information about how to contact the Complaint
15 Coordinator readily accessible to litigants and the public.

16
17 **(b) Presentation and referral of complaints to Complaint Coordinator**

18
19 All complaints should be presented or referred to the Complaint Coordinator.

20
21 **(c) Memorandum of unwritten complaints**

22
23 If a complaint is not in writing, the Complaint Coordinator must offer to help the
24 complainant prepare a written complaint. If the complainant declines to do so, the
25 Complaint Coordinator must prepare a memorandum that includes the substance of
26 the complaint and any other relevant information required to process the complaint.

27
28
29 **Advisory Committee Comment**

30
31 Subdivision (b). Coordination of complaints by a person knowledgeable about mediation is important to help ensure
32 that these complaint procedures are followed and that mediation confidentiality is preserved.

33
34
35 **Rule 3.871. Preliminary review and inquiry by Complaint Coordinator**

36
37 **(a) Preliminary review**

- 38
39 (1) The Complaint Coordinator must conduct a preliminary review of each
40 complaint, which may include communication with the complainant to clarify
41 the complaint or to provide information that may address the complainant's
42 concern.

1 (2) After conducting the preliminary review, the Complaint Coordinator may close
2 a complaint:

3
4 (A) That is withdrawn by the complainant;

5
6 (B) That is without sufficient merit to proceed further; or

7
8 (C) That does not indicate that any violation of article 2 may have occurred.
9

10 **(b) Preliminary inquiry**

11
12 (1) If a complaint is not closed as a result of the preliminary review, the Complaint
13 Coordinator must inform the mediator of the receipt and nature of the
14 complaint and give the mediator an opportunity to respond.

15
16 (2) The Complaint Coordinator may terminate the preliminary inquiry and close
17 the complaint if:

18
19 (A) The complaint is found to be lacking in merit or trivial in nature;

20
21 (B) An acceptable explanation is provided by the mediator; or

22
23 (C) The complainant, the mediator and the Complaint Coordinator agree on a
24 resolution.
25

26 **Advisory Committee Comment**

27
28 **Subdivision (b).** In determining whether to close a complaint under (b)(2), the Complaint Coordinator should
29 consider whether there are or have been other complaints about the mediator.
30

31
32 **Rule 3.872. Initiating an investigation**

33
34 **(a) Referral of complaint**

35
36 If a complaint is not closed as a result of the preliminary review or inquiry, the
37 Complaint Coordinator must refer it to the Complaint Committee appointed under
38 rule 3.873(a) for investigation. The referral should provide a summary of the
39 preliminary inquiry that includes:
40

41 (1) A copy of the complaint or the written memorandum prepared under rule
42 3.870(c);

43
44 (2) A copy or summary of the mediator's response; and

1
2 (3) A list of any violations of article 2 that it appears may have occurred.

3
4 **(b) Initiation by Complaint Coordinator**

5
6 The Complaint Coordinator may initiate a complaint and refer it to the Complaint
7 Committee appointed under rule 3.873(a) for investigation. The complaint may be
8 based on information received from any source indicating that a mediator may have
9 violated a provision of article 2, and the referral should include a list of any
10 violations that it appears may have occurred.

11
12 **Advisory Committee Comment**

13
14 Although subdivision (b) allows the Complaint Coordinator to initiate a complaint, this article is not intended to set
15 forth the only procedure by which a court may reprimand a mediator, remove a mediator from its panel, or impose
16 conditions for remaining on its panel.

17
18
19 **Rule 3.873. Investigation and recommendation by Complaint Committee**

20
21 **(a) Complaint Committee appointment and responsibility**

22
23 The presiding judge must appoint a Complaint Committee that includes at least one
24 individual with experience as a mediator to investigate and make recommendations
25 concerning the disposition of any complaint that is referred or initiated under rule
26 3.872.

27
28 **(b) Mediator's notice and opportunity to respond**

29
30 (1) The Complaint Committee must provide the mediator with a copy of the
31 complaint or the written memorandum prepared under 3.870(c) and a list of
32 any violations of article 2 that it appears may have occurred.

33
34 (2) The mediator must be provided an opportunity to respond to the complaint and
35 the list of possible violations.

36
37 **(c) Report and recommendation**

38
39 (1) After conducting an investigation that the Complaint Committee considers
40 appropriate, the committee must make a written report that summarizes the
41 investigation and sets forth the committee's recommendation concerning the
42 disposition of the complaint. The committee may recommend that no further
43 action be taken on the complaint or that one or more actions that are
44 permissible under rule 3.875 be taken.

1
2 (2) If the Complaint Committee recommends that action be taken under rule 3.875,
3 the committee may inform the mediator of its recommendation and inquire
4 whether the mediator accepts that recommendation. If the mediator accepts the
5 recommendation, the committee's report must indicate this.

6
7 (3) The Complaint Committee must submit its report and recommendation to the
8 Complaint Coordinator.

9
10 **Advisory Committee Comment**

11
12 **Subdivision (a).** The presiding judge may appoint a standing Complaint Committee or appoint Complaint
13 Committees on a case-by-case basis.

14
15 **Subdivision (c).** It may be helpful for the presiding judge or the presiding judge's designee to know whether the
16 Complaint Committee's recommendation is acceptable to the mediator. However, in some situations, the Complaint
17 Committee may conclude that it would not be beneficial to inform the mediator of the recommendation. Informing
18 the mediator of the recommendation is not considered essential because rule 3.874 is intended to allow the presiding
19 judge or the presiding judge's designee to review the Complaint Committee's recommendation, rather than to give
20 the mediator an additional forum in which to contest the complaint.

21
22 **Rule 3.874. Final decision on complaint**

23
24 **(a) Responsibility for final decision**

25
26 The presiding judge is responsible for making the final decision on the complaint or
27 for appointing another judge or a committee, other than the Complaint Committee,
28 to perform this function.

29
30 **(b) Forwarding of Complaint Committee's recommendation**

31
32 The Complaint Coordinator must promptly forward a copy of the Complaint
33 Committee's report and recommendation to the presiding judge or to the other
34 decisionmaker appointed under (a).

35
36 **(c) Final determination of disposition**

37
38 (1) The presiding judge or the other decisionmaker appointed under (a) may adopt
39 the Complaint Committee's recommendation by notifying the Complaint
40 Coordinator of this or by allowing the recommendation to become the final
41 disposition as provided in (3).

42
43 (2) After giving due consideration to the Complaint Committee's
44 recommendation, the presiding judge or other decisionmaker may direct a
45 disposition that is different from the recommendation. This final disposition

1 may be that no further action be taken on the complaint or that one or more
2 actions that are permissible under rule 3.875 be taken. If the final disposition is
3 different from the Complaint Committee's recommendation, the decisionmaker
4 must submit it to the Complaint Coordinator in writing within 30 days after the
5 committee's recommendation was forwarded.

- 6
7 (3) If the presiding judge or other decisionmaker does not submit a different
8 disposition to the Complaint Coordinator within 30 days after the Complaint
9 Committee's recommendation was forwarded, the Complaint Committee's
10 recommendation will become the final disposition of the complaint.

11
12 **(d) Notification to mediator**

13
14 The Complaint Coordinator must promptly notify the mediator in writing of the
15 final disposition of the complaint.

16
17 **Advisory Committee Comment**

18
19 **Subdivision (a).** The presiding judge may appoint another judge or a committee, other than the Complaint
20 Committee, to make the final decision concerning complaints on a continuing or on a case-by-case basis.

21
22 **Subdivision (d).** Rule 3.868(c) requires the court to promptly notify the complainant in writing of the disposition of
23 the complaint, at any stage of the complaint process.

24
25
26 **Rule 3.875. Permissible dispositions**

27
28 The presiding judge, the other judge, or the committee appointed under rule 3.874(a)
29 may:

- 30
31 (1) Admonish or reprimand the mediator;
32
33 (2) Impose additional mediation training requirements as a condition of the
34 mediator's remaining on the court's panel or list; or
35
36 (3) Remove the mediator from the court's panel or list, or otherwise prohibit the
37 mediator from receiving future mediation referrals from the court if it appears
38 that the mediator has failed to comply with article 2, when applicable.

39
40 *DRAFTER'S NOTE: The actions that a court may take when a mediator fails to comply with the rules of*
41 *conduct are currently set forth in rule 3.865(b) and would be modified slightly by this rule.*
42
43

1 **Rule 3.876. Interim suspension pending final decision on complaint**

2
3 If the preliminary inquiry or the investigation indicates that a mediator may pose a threat
4 of harm to mediation participants or to the integrity of the court’s mediation program, the
5 Complaint Coordinator or the Complaint Committee may recommend that the mediator
6 be suspended pending final disposition of the complaint. The presiding judge, the other
7 judge, or the committee designated to make a final decision on the complaint may
8 suspend the mediator upon such recommendation.

9
10
11 **Rule 3.877-3.868. Disqualification from subsequently serving as an adjudicator**

12
13 A person who has participated in ~~or received information about the receipt review,~~
14 investigation, or resolution of ~~an inquiry or a particular~~ complaint under ~~rule 3.865~~ this
15 article, or otherwise received information about the substance of such a complaint, other
16 than information that is publicly disclosed under rule 3.869(d), must not subsequently
17 hear or determine any contested issue of law, fact, or procedure concerning the dispute
18 that was the subject of the underlying mediation or any other dispute that arises from the
19 mediation, as a judge, an arbitrator, a referee, or a juror, or in any other adjudicative
20 capacity, in any court action or proceeding.

21
22 **Advisory Committee Comment**

23
24 Persons who participated in a complaint procedure are prohibited from subsequently adjudicating related disputes
25 because they may have learned of confidential mediation communications that were disclosed in the complaint
26 process or may have been influenced by what transpired in that process. Since the information that can be publicly
27 disclosed under rule 3.869(d) is limited and excludes mediation communications, it is unnecessary to disqualify
28 persons who received this publicly disclosed information from subsequently adjudicating the dispute. Additionally,
29 disqualifying all such persons might, in some circumstances, prevent a court from adjudicating pending litigation.

30
31
32 **Chapter 4. Civil Action Mediation Program Rules**

33
34 **Rule 3.880-3.870. Application**

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36 ***

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39 **Rule 3.881-3.871. Actions subject to mediation**

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41 ***

42
43
44 **Rule 3.882-3.872. Panels of mediators**

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4 **Rule 3.883-3.873. Selection of mediators**

5
6 ***

7
8
9 **Rule 3.884-3.874. Attendance, participant lists, and mediation statements**

10
11 ***

12
13
14 **Rule 3.885-3.875. Filing of statement by mediator**

15
16 ***

17
18
19 **Rule 3.886-3.876. Coordination with Trial Court Delay Reduction Act**

20
21 ***

22
23
24 **Rule 3.887-3.877. Statistical information**

25
26 ***

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28
29 **Rule 3.888-3.878. Educational material**

30
31 * * *

32
33
34 **Rule 10.781. Court-related ADR neutrals**

35
36 **(a)–(b) *****

37
38 **(c) Privilege to serve as court-program neutral**

39
40 Inclusion on a court list of ADR neutrals, and eligibility to be recommended,
41 appointed, or compensated by the court to serve as a neutral, are privileges that are
42 revocable and confer no vested right on the neutral.
43

Item SPR07-11 Response Form

Title: Alternative Dispute Resolution: Procedures for Addressing Complaints About Court-Program Mediators for Civil Cases (renumber rules 3.870–3.878 of the California Rules of Court as rules 3.880–3.888, respectively; amend and renumber rules 3.865, 3.866, 3.867, and 3.868 as rules 3.866, 3.870, 3.869, and 3.877, respectively; adopt rules 3.865, 3.867, 3.668, and 3.871–3.876; amend rule 10.780; and revise form ADR-107)

- Agree with proposed changes
- Agree with proposed changes **if modified**
- Do not agree with proposed changes

Comments: _____

Name: _____ Title: _____

Organization: _____

- Commenting on behalf of an organization

Address: _____

City, State, Zip: _____

Please **write** or **fax** or **respond using the Internet** to:

Address: Ms. Camilla Kieliger,
Judicial Council, 455 Golden Gate Avenue,
San Francisco, CA 94102
Fax: (415) 865-7664 **Attention:** Camilla Kieliger
Internet: www.courtinfo.ca.gov/invitationstocomment

DEADLINE FOR COMMENT: 5:00 p.m., Wednesday, June 20, 2007

Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

Circulation for comment does not imply endorsement by the Judicial Council, the Rules and Projects Committee, or the Policy Coordination and Liaison Committee. All comments will become part of the public record of the council's action.