

Chapter 3. General Rules Relating to Mediation of Civil Cases

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Rule 3.850. - Purpose and function

(a) Standards of conduct

The rules in this article establish the minimum standards of conduct for mediators in court-connected mediation programs for general civil cases. These rules are intended to guide the conduct of mediators in these programs, to inform and protect participants in these mediation programs, and to promote public confidence in the mediation process and the courts. For mediation to be effective, there must be broad public confidence in the integrity and fairness of the process. Mediators in court-connected programs are responsible to the parties, the public, and the courts for conducting themselves in a manner that merits that confidence.

(Subd (a) amended effective January 1, 2007.)

(b) Scope and limitations

These rules are not intended to:

- (1) Establish a ceiling on what is considered good practice in mediation or discourage efforts by courts, mediators, or others to educate mediators about best practices;
- (2) Create a basis for challenging a settlement agreement reached in connection with mediation; or

(3) Create a basis for a civil cause of action against a mediator.

(Subd (b) amended effective January 1, 2007.)

Rule 3.850 amended and renumbered effective January 1, 2007; adopted as rule 1620 effective January 1, 2003.

Rule 3.851. Application

(a) Circumstances applicable

The rules in this article apply to mediations in which a mediator:

- (1) Has agreed to be included on a superior court's list or panel of mediators for general civil cases and is notified by the court or the parties that he or she has been selected to mediate a case within that court's mediation program; or
- (2) Has agreed to mediate a general civil case pending in a superior court after being notified by the court or the parties that he or she was recommended, selected, or appointed by that court or will be compensated by that court to mediate a case within that court's mediation program.

(Subd (a) amended effective January 1, 2009; previously amended effective January 1, 2007.)

(b) Application to listed firms

If a court's panel or list includes firms that provide mediation services, all mediators affiliated with a listed firm are required to comply with the rules in this article when they are notified by the court or the parties that the firm was selected from the court list to mediate a general civil case within that court's mediation program.

(Subd (b) amended effective July 1, 2007; previously amended effective January 1, 2007.)

(c) Time of applicability

Except as otherwise provided in these rules, the rules in this article apply from the time the mediator agrees to mediate a case until the end of the mediation in that case.

(Subd (c) amended effective January 1, 2007.)

(d) Inapplicability to judges

The rules in this article do not apply to judges or other judicial officers while they are serving in a capacity in which they are governed by the Code of Judicial Ethics.

(Subd (d) amended effective January 1, 2007.)

(e) Inapplicability to settlement conferences

The rules in this article do not apply to settlement conferences conducted under rule 3.1380.

(Subd (e) amended effective January 1, 2007.)

Rule 3.851 amended effective January 1, 2009; adopted as rule 1620.1 effective January 1, 2003; previously amended and renumbered effective January 1, 2007; previously amended effective July 1, 2007.

Advisory Committee Comment

Subdivision (d). Although these rules do not apply to them, judicial officers who serve as mediators in their courts' mediation programs are nevertheless encouraged to be familiar with and observe these rules when mediating, particularly the rules concerning subjects not covered in the Code of Judicial Ethics such as voluntary participation and self-determination.

Rule 3.852. Definitions

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

- (1) "Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.
- (2) "Mediator" means a neutral person who conducts a mediation.
- (3) "Participant" means any individual, entity, or group, other than the mediator taking part in a mediation, including but not limited to attorneys for the parties.
- (4) "Party" means any individual, entity, or group taking part in a mediation that is a plaintiff, a defendant, a cross-complainant, a cross-defendant, a petitioner, a respondent, or an intervenor in the case.

Rule 3.852 amended and renumbered effective January 1, 2007; adopted as rule 1620.2 effective January 1, 2003.

Advisory Committee Comment

The definition of "mediator" in this rule 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 the mediation. However, these definitions are applicable only to these rules of conduct and do not limit or expand mediation confidentiality under the Evidence Code or other law.

The definition of "participant" includes insurance adjusters, experts, and consultants as well as the parties and their attorneys.

Rule 3.853. Voluntary participation and self-determination

A mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties. For this purpose a mediator must:

- (1) Inform the parties, at or before the outset of the first mediation session, that any resolution of the dispute in mediation requires a voluntary agreement of the parties;

(2) Respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time; and

(3) Refrain from coercing any party to make a decision or to continue to participate in the mediation.

Rule 3.853 amended and renumbered effective January 1, 2007; adopted as rule 1620.3 effective January 1, 2003.

Advisory Committee Comment

Voluntary participation and self-determination are fundamental principles of mediation that apply both to mediations in which the parties voluntarily elect to mediate and to those in which the parties are required to go to mediation in a mandatory court mediation program or by court order. Although the court may order participants to attend mediation, a mediator may not mandate the extent of their participation in the mediation process or coerce any party to settle the case.

After informing the parties of their choices and the consequences of those choices, a mediator can invoke a broad range of approaches to assist the parties in reaching an agreement without offending the principles of voluntary participation and self-determination, including (1) encouraging the parties to continue participating in the mediation when it reasonably appears to the mediator that the possibility of reaching an uncoerced, consensual agreement has not been exhausted and (2) suggesting that a party consider obtaining professional advice (for example, informing an unrepresented party that he or she may consider obtaining legal advice). Conversely, examples of conduct that violate the principles of voluntary participation and self-determination include coercing a party to continue participating in the mediation after the party has told the mediator that he or she wishes to terminate the mediation, providing an opinion or evaluation of the dispute in a coercive manner or over the objection of the parties, using abusive language, and threatening to make a report to the court about a party's conduct at the mediation.

Rule 3.854. Confidentiality

(a) Compliance with confidentiality law

A mediator must, at all times, comply with the applicable law concerning confidentiality.

(b) Informing participants of confidentiality

At or before the outset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings.

(c) Confidentiality of separate communications; caucuses

If, after all the parties have agreed to participate in the mediation process and the mediator has agreed to mediate the case, a mediator speaks separately with one or more participants out of the presence of the other participants, the mediator must first discuss with all participants the mediator's practice regarding confidentiality for separate communications with the participants. Except as required by law, a mediator must not disclose information revealed in confidence during such separate communications unless authorized to do so by the participant or participants who revealed the information.

(d) Use of confidential information

A mediator must not use information that is acquired in confidence in the course of a mediation outside the mediation or for personal gain.

Rule 3.854 renumbered effective January 1, 2007; adopted as rule 1620.4 effective January 1, 2003.

Advisory Committee Comment

Subdivision (a). The general law concerning mediation confidentiality is found in Evidence Code sections 703.5 and 1115–1128 and in cases interpreting those sections. (See, e.g., *Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1; *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155; and *Gilbert v. National Corp. for Housing Partnerships* (1999) 71 Cal.App.4th 1240.)

Rule 3.855. Impartiality, conflicts of interest, disclosure, and withdrawal

(a) Impartiality

A mediator must maintain impartiality toward all participants in the mediation process at all times.

(b) Disclosure of matters potentially affecting impartiality

(1) A mediator must make reasonable efforts to keep informed about matters that reasonably could raise a question about his or her ability to conduct the proceedings impartially, and must disclose these matters to the parties. These matters include:

(A) Past, present, and currently expected interests, relationships, and affiliations of a personal, professional, or financial nature; and

(B) The existence of any grounds for disqualification of a judge specified in Code of Civil Procedure section 170.1.

(2) A mediator's duty to disclose is a continuing obligation, from the inception of the mediation process through its completion. Disclosures required by this rule must be made as soon as practicable after a mediator becomes aware of a matter that must be disclosed. To the extent possible, such disclosures should be made before the first mediation session, but in any event they must be made within the time required by applicable court rules or statutes.

(Subd (b) amended effective January 1, 2007.)

(c) Proceeding if there are no objections or questions concerning impartiality

Except as provided in (f), if, after a mediator makes disclosures, no party objects to the mediator and no participant raises any question or concern about the mediator's ability to conduct the mediation impartially, the mediator may proceed.

(Subd (c) amended effective January 1, 2007.)

(d) Responding to questions or concerns concerning impartiality

If, after a mediator makes disclosures or at any other point in the mediation process, a participant raises a question or concern about the mediator's ability to conduct the mediation impartially, the mediator must address the question or concern with the

participants. Except as provided in (f), if, after the question or concern is addressed, no party objects to the mediator, the mediator may proceed.

(Subd (d) amended effective January 1, 2007.)

(e) Withdrawal or continuation upon party objection concerning impartiality

In a two-party mediation, if any party objects to the mediator after the mediator makes disclosures or discusses a participant's question or concern regarding the mediator's ability to conduct the mediation impartially, the mediator must withdraw. In a mediation in which there are more than two parties, the mediator may continue the mediation with the nonobjecting parties, provided that doing so would not violate any other provision of these rules, any law, or any local court rule or program guideline.

(f) Circumstances requiring mediator recusal despite party consent

Regardless of the consent of the parties, a mediator either must decline to serve as mediator or, if already serving, must withdraw from the mediation if:

- (1) The mediator cannot maintain impartiality toward all participants in the mediation process; or
- (2) Proceeding with the mediation would jeopardize the integrity of the court or of the mediation process.

Rule 3.855 amended and renumbered effective January 1, 2007; adopted as rule 1620.5 effective January 1, 2003.

Advisory Committee Comment

Subdivision (b). This subdivision is intended to provide parties with information they need to help them determine whether a mediator can conduct the mediation impartially. A mediator's overarching duty under this subdivision is to make a "reasonable effort" to identify matters that, in the eyes of a reasonable person, could raise a question about the mediator's ability to conduct the mediation impartially, and to inform the parties about those matters. What constitutes a "reasonable effort" to identify such matters varies depending on the circumstances, including whether the case is scheduled in advance or received on the spot, and the information about the participants and the subject matter that is provided to the mediator by the court and the parties.

The interests, relationships, and affiliations that a mediator may need to disclose under (b)(1)(A) include: (1) prior, current, or currently expected service as a mediator in another mediation involving any of the participants in the present mediation; (2) prior, current, or currently expected business relationships or transactions between the mediator and any of the participants; and (3) the mediator's ownership of stock or any other significant financial interest involving any participant in the mediation. Currently expected interests, relationships, and affiliations may include, for example, an intention to form a partnership or to enter into a future business relationship with one of the participants in the mediation.

Although (b)(1) specifies interests, relationships, affiliations, and matters that are grounds for disqualification of a judge under Code of Civil Procedure section 170.1, these are only examples of common matters that reasonably could raise a question about a mediator's ability to conduct the mediation impartially and, thus, must be disclosed. The absence of particular interests, relationships, affiliations, and section 170.1 matters does not necessarily mean that there is no matter that could reasonably raise a question about the mediator's ability to conduct the mediation impartially. A mediator

must make determinations concerning disclosure on a case-by-case basis, applying the general criteria for disclosure under (b)(1).

Attorney mediators should be aware that under the section 170.1 standard, they may need to make disclosures when an attorney in their firm is serving or has served as a lawyer for any of the parties in the mediation. Section 170.1 does not specifically address whether a mediator must disclose when another member of the mediator's dispute resolution services firm is providing or has provided services to any of the parties in the mediation. Therefore, a mediator must evaluate such circumstances under the general criteria for disclosure under (b)(1)—that is, is it a matter that, in the eyes of a reasonable person, could raise a question about the mediator's ability to conduct the mediation impartially?

If there is a conflict between the mediator's obligation to maintain confidentiality and the mediator's obligation to make a disclosure, the mediator must determine whether he or she can make a general disclosure of the circumstance without revealing any confidential information, or must decline to serve.

Rule 3.856. Competence

(a) Compliance with court qualifications

A mediator must comply with experience, training, educational, and other requirements established by the court for appointment and retention.

(b) Truthful representation of background

A mediator has a continuing obligation to truthfully represent his or her background to the court and participants. Upon a request by any party, a mediator must provide truthful information regarding his or her experience, training, and education.

(c) Informing court of public discipline and other matters

A mediator must also inform the court if:

- (1) Public discipline has been imposed on the mediator by any public disciplinary or professional licensing agency;
- (2) The mediator has resigned his or her membership in the State Bar or another professional licensing agency while disciplinary or criminal charges were pending;
- (3) A felony charge is pending against the mediator;
- (4) The mediator has been convicted of a felony or of a misdemeanor involving moral turpitude; or
- (5) There has been an entry of judgment against the mediator in any civil action for actual fraud or punitive damages.

(d) Assessment of skills; withdrawal

A mediator has a continuing obligation to assess whether or not his or her level of skill, knowledge, and ability is sufficient to conduct the mediation effectively. A mediator must decline to serve or withdraw from the mediation if the mediator determines that he or she does not have the level of skill, knowledge, or ability necessary to conduct the mediation effectively.

Rule 3.856 renumbered effective January 1, 2007; adopted as rule 1620.6 effective January 1, 2003.

Advisory Committee Comment

Subdivision (d). No particular advanced academic degree or technical or professional experience is a prerequisite for competence as a mediator. Core mediation skills include communicating clearly, listening effectively, facilitating communication among all participants, promoting exploration of mutually acceptable settlement options, and conducting oneself in a neutral manner.

A mediator must consider and weigh a variety of issues in order to assess whether his or her level of skill, knowledge, and ability is sufficient to make him or her effective in a particular mediation. Issues include whether the parties (1) were involved or had input in the selection of the mediator; (2) had access to information about the mediator's background or level of skill, knowledge, and ability; (3) have a specific expectation or perception regarding the mediator's level of skill, knowledge, and ability; (4) have expressed a preference regarding the style of mediation they would like or expect; or (5) have expressed a desire to discuss legal or other professional information, to hear a personal evaluation of or opinion on a set of facts as presented, or to be made aware of the interests of persons who are not represented in mediation.

Rule 3.857. Quality of mediation process

(a) Diligence

A mediator must make reasonable efforts to advance the mediation in a timely manner. If a mediator schedules a mediation for a specific time period, he or she must keep that time period free of other commitments.

(b) Procedural fairness

A mediator must conduct the mediation proceedings in a procedurally fair manner. "Procedural fairness" means a balanced process in which each party is given an opportunity to participate and make uncoerced decisions. A mediator is not obligated to ensure the substantive fairness of an agreement reached by the parties.

(c) Explanation of process

In addition to the requirements of rule 3.853 (voluntary participation and self-determination), rule 3.854(a) (confidentiality), and (d) of this rule (representation and other professional services), at or before the outset of the mediation the mediator must provide all participants with a general explanation of:

- (1) The nature of the mediation process;
- (2) The procedures to be used; and
- (3) The roles of the mediator, the parties, and the other participants.

(Subd (c) amended effective January 1, 2007.)

(d) Representation and other professional services

A mediator must inform all participants, at or before the outset of the first mediation session, that during the mediation he or she will not represent any participant as a lawyer

or perform professional services in any capacity other than as an impartial mediator. Subject to the principles of impartiality and self-determination, a mediator may provide information or opinions that he or she is qualified by training or experience to provide.

(e) Recommending other services

A mediator may recommend the use of other services in connection with a mediation and may recommend particular providers of other services. However, a mediator must disclose any related personal or financial interests if recommending the services of specific individuals or organizations.

(f) Nonparticipants' interests

A mediator may bring to the attention of the parties the interests of others who are not participating in the mediation but who may be affected by agreements reached as a result of the mediation.

(g) Combining mediation with other ADR processes

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

(h) Settlement agreements

Consistent with (d), a mediator may present possible settlement options and terms for discussion. A mediator may also assist the parties in preparing a written settlement agreement, provided that in doing so the mediator confines the assistance to stating the settlement as determined by the parties.

(Subd (h) amended effective January 1, 2007.)

(i) Discretionary termination and withdrawal

A mediator may suspend or terminate the mediation or withdraw as mediator when he or she reasonably believes the circumstances require it, including when he or she suspects that:

- (1) The mediation is being used to further illegal conduct;
- (2) A participant is unable to participate meaningfully in negotiations; or
- (3) Continuation of the process would cause significant harm to any participant or a third party.

(j) Manner of withdrawal

When a mediator determines that it is necessary to suspend or terminate a mediation or to withdraw, the mediator must do so without violating the obligation of confidentiality and in a manner that will cause the least possible harm to the participants.

Rule 3.857 amended and renumbered effective January 1, 2007; adopted as rule 1620.7 effective January 1, 2003.

Advisory Committee Comment

Subdivision (c). The explanation of the mediation process should include a description of the mediator's style of mediation.

Subdivision (d). Subject to the principles of impartiality and self-determination, and if qualified to do so, a mediator may (1) discuss a party's options, including a range of possible outcomes in an adjudicative process; (2) offer a personal evaluation of or opinion on a set of facts as presented, which should be clearly identified as a personal evaluation or opinion; or (3) communicate the mediator's opinion or view of what the law is or how it applies to the subject of the mediation, provided that the mediator does not also advise any participant about how to adhere to the law or on what position the participant should take in light of that opinion.

One question that frequently arises is whether a mediator's assessment of claims, defenses, or possible litigation outcomes constitutes legal advice or the practice of law. Similar questions may arise when accounting, architecture, construction, counseling, medicine, real estate, or other licensed professions are relevant to a mediation. This rule does not determine what constitutes the practice of law or any other licensed profession. A mediator should be cautious when providing any information or opinion related to any field for which a professional license is required, in order to avoid doing so in a manner that may constitute the practice of a profession for which the mediator is not licensed, or in a manner that may violate the regulations of a profession that the mediator is licensed to practice. A mediator should exercise particular caution when discussing the law with unrepresented parties and should inform such parties that they may seek independent advice from a lawyer.

Subdivision (i). Subdivision (i)(2) is not intended to establish any new responsibility or diminish any existing responsibilities that a mediator may have, under the Americans With Disabilities Act or other similar law, to attempt to accommodate physical or mental disabilities of a participant in mediation.

Rule 3.858. Marketing

(a) Truthfulness

A mediator must be truthful and accurate in marketing his or her mediation services. A mediator is responsible for ensuring that both his or her own marketing activities and any marketing activities carried out on his or her behalf by others comply with this rule.

(b) Representations concerning court approval

A mediator may indicate in his or her marketing materials that he or she is a member of a particular court's panel or list but, unless specifically permitted by the court, must not indicate that he or she is approved, endorsed, certified, or licensed by the court.

(c) Promises, guarantees, and implications of favoritism

In marketing his or her mediation services, a mediator must not:

- (1) Promise or guarantee results; or

(2) Make any statement that directly or indirectly implies bias in favor of one party or participant over another.

(d) Solicitation of business

A mediator must not solicit business from a participant in a mediation proceeding while that mediation is pending.

Rule 3.858 renumbered effective January 1, 2007; adopted as rule 1620.8 effective January 1, 2003.

Advisory Committee Comment

Subdivision (d). This rule is not intended to prohibit a mediator from accepting other employment from a participant while a mediation is pending, provided that there was no express solicitation of this business by the mediator and that accepting that employment does not contravene any other provision of these rules, including the obligations to maintain impartiality, confidentiality, and the integrity of the process. If other employment is accepted from a participant while a mediation is pending, however, the mediator may be required to disclose this to the parties under rule 3.855.

This rule also is not intended to prohibit a mediator from engaging in general marketing activities. General marketing activities include, but are not limited to, running an advertisement in a newspaper and sending out a general mailing (either of which may be directed to a particular industry or market).

Rule 3.859. Compensation and gifts

(a) Compliance with law

A mediator must comply with any applicable requirements concerning compensation established by statute or the court.

(b) Disclosure of and compliance with compensation terms

Before commencing the mediation, the mediator must disclose to the parties in writing any fees, costs, or charges to be paid to the mediator by the parties. A mediator must abide by any agreement that is reached concerning compensation.

(c) Contingent fees

The amount or nature of a mediator's fee must not be made contingent on the outcome of the mediation.

(Subd (c) amended effective January 1, 2007.)

(d) Gifts and favors

A mediator must not at any time solicit or accept from or give to any participant or affiliate of a participant any gift, bequest, or favor that might reasonably raise a question concerning the mediator's impartiality.

Rule 3.859 amended and renumbered effective January 1, 2007; adopted as rule 1620.9 effective January 1, 2003.

Advisory Committee Comment

Subdivision (b). It is good practice to put mediation fee agreements in writing, and mediators are strongly encouraged to do so; however, nothing in this rule is intended to preclude enforcement of a compensation agreement for mediation services that is not in writing.

Subdivision (d). Whether a gift, bequest, or favor “might reasonably raise a question concerning the mediator’s impartiality” must be determined on a case-by-case basis. This subdivision is not intended to prohibit a mediator from accepting other employment from any of the participants, consistent with rule 3.858(d).

Rule 3.860. Attendance sheet and agreement to disclosure

(a) Attendance sheet

In each mediation to which these rules apply under rule 3.851(a), the mediator must request that all participants in the mediation complete an attendance sheet stating their names, mailing addresses, and telephone numbers; retain the attendance sheet for at least two years; and submit it to the court on request.

(Subd (a) amended effective January 1, 2007.)

(b) Agreement to disclosure

The mediator must agree, in each mediation to which these rules apply under rule 3.851(a), that if an inquiry or a complaint is made about the conduct of the mediator, mediation communications may be disclosed solely for purposes of a complaint procedure conducted pursuant to rule 3.865 to address that complaint or inquiry.

(Subd (b) amended effective January 1, 2007.)

Rule 3.860 amended and renumbered effective January 1, 2007; adopted as rule 1621 effective January 1, 2006.

Rule 3.865. Complaint procedure required

(a) Court procedures required

Each superior court that makes a list of mediators available to litigants in general civil cases or that recommends, selects, appoints, or compensates a mediator to mediate any general civil case pending in the court must establish procedures for receiving, investigating, and resolving complaints that mediators who are on the court’s list or who are recommended, selected, appointed, or compensated by the court failed to comply with the rules for conduct of mediators set forth in this article, when applicable.

(Subd (a) amended effective January 1, 2007; previously amended effective January 1, 2006.)

(b) Actions court may take

The court may impose additional mediation training requirements on a mediator, reprimand a mediator, remove a mediator from the court’s panel or list, or otherwise prohibit a mediator from receiving future mediation referrals from the court if the

mediator fails to comply with the rules of conduct for mediators in this article, when applicable.

(Subd (b) amended effective January 1, 2007; previously amended effective January 1, 2006.)

Rule 3.865 amended and renumbered effective January 1, 2007; adopted as rule 1622 effective January 1, 2003; previously amended effective January 1, 2006.

Rule 3.866. Designation of person to receive inquiries and complaints

In each superior court that is required to establish a complaint procedure under rule 3.865, the presiding judge must designate a person who is knowledgeable about mediation to receive and coordinate the investigation of any inquiries or complaints about the conduct of mediators who are subject to rule 3.865.

Rule 3.866 amended and renumbered effective January 1, 2007; adopted as rule 1622.1 effective January 1, 2006.

Rule 3.867. Confidentiality of complaint procedures, information, and records

(a) This rule's requirement that rule 3.865 complaint procedures be confidential is intended to:

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

(Subd (a) amended effective January 1, 2007.)

(b) All procedures for receiving, investigating, and resolving inquiries or complaints about the conduct of mediators must be designed to preserve the confidentiality of mediation communications, including but not limited to the confidentiality of any communications between the mediator and individual mediation participants or subgroups of mediation participants.

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

(Subd (c) amended effective January 1, 2007.)

(d) The presiding judge or a person designated by the presiding judge for this purpose may, in his or her discretion, authorize the disclosure of information or records concerning rule 3.865 complaint procedures that do not reveal any mediation communications, including the name of a mediator against whom action has been taken under rule 3.865, the action taken, and the general basis on which the action was taken. In determining whether to authorize the disclosure of information or records under this subdivision, the presiding judge or designee should consider the purposes of the confidentiality of rule 3.865 complaint procedures stated in (a)(2) and (a)(3).

(Subd (d) amended effective January 1, 2007.)

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

(Subd (e) amended effective January 1, 2007.)

Rule 3.867 amended and renumbered effective January 1, 2007; adopted as rule 1622.2 effective January 1, 2006.

Advisory Committee Comment

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

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

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

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

Rule 3.868. Disqualification from subsequently serving as an adjudicator

A person who has participated in or received information about the receipt, investigation or resolution of an inquiry or a complaint under rule 3.865 must not subsequently hear or determine any contested issue of law, fact, or procedure concerning the dispute that was

the subject of the underlying mediation or any other dispute that arises from the mediation, as a judge, an arbitrator, a referee, or a juror, or in any other adjudicative capacity, in any court action or proceeding.

Rule 3.868 amended and renumbered effective January 1, 2007; adopted as rule 1622.3 effective January 1, 2006.

Chapter 4. Civil Action Mediation Program Rules

Rule 3.870. - Application

Rule 3.871. - Actions subject to mediation

Rule 3.872. - Panels of mediators

Rule 3.873. - Selection of mediators

Rule 3.874. - Attendance, participant lists, and mediation statements

Rule 3.875. - Filing of statement by mediator

Rule 3.876. - Coordination with Trial Court Delay Reduction Act

Rule 3.877. - Statistical information

Rule 3.878. - Educational material

Rule 3.870. - Application

The rules in this chapter implement the Civil Action Mediation Act, Code of Civil Procedure section 1775 et seq. Under section 1775.2, they apply in the Superior Court of California, County of Los Angeles and in other courts that elect to apply the act.

Rule 3.870 amended and renumbered effective January 1, 2007; adopted as rule 1630 effective March 1, 1994.

Rule 3.871. Actions subject to mediation

(a) Actions that may be submitted to mediation

The following actions may be submitted to mediation under these provisions:

- (1) *By court order* - Any action in which the amount in controversy, independent of the merits of liability, defenses, or comparative negligence, does not exceed \$50,000 for each plaintiff. The court must determine the amount in controversy under Code of Civil Procedure section 1775.5. Determinations to send a case to mediation must be made by the court after consideration of the expressed views of the parties on the amenability of the case to mediation. The court must not require the parties or their counsel to personally appear in court for a conference held solely to determine whether to send their case to mediation.

(2) *By stipulation* - Any other action, regardless of the amount of controversy, in which all parties stipulate to such mediation. The stipulation must be filed not later than 90 days before trial unless the court permits a later time.

(Subd (a) amended effective January 1, 2007.)

(b) Case-by-case determination

Amenability of a particular action for mediation must be determined on a case-by-case basis, rather than categorically.

(Subd (b) amended effective January 1, 2007.)

Rule 3.871 amended and renumbered effective January 1, 2007; adopted as rule 1631 effective March 1, 1994.

Rule 3.872. Panels of mediators

Each court, in consultation with local bar associations, ADR providers, and associations of providers, must identify persons who may be appointed as mediators. The court must consider the criteria in standard 10.72 of the Standards of Judicial Administration and California Code of Regulations, title 16, section 3622, relating to the Dispute Resolution Program Act.

Rule 3.872 amended and renumbered effective January 1, 2007; adopted as rule 1632 effective March 1, 1994.

Rule 3.873. Selection of mediators

The parties may stipulate to any mediator, whether or not the person selected is among those identified under rule 3.872, within 15 days of the date an action is submitted to mediation. If the parties do not stipulate to a mediator, the court must promptly assign a mediator to the action from those identified under rule 3.872.

Rule 3.873 amended and renumbered effective January 1, 2007; adopted as rule 1633 effective March 1, 1994.

Rule 3.874. Attendance, participant lists, and mediation statements

(a) Attendance

(1) All parties and attorneys of record must attend all mediation sessions in person unless excused or permitted to attend by telephone as provided in (3). If a party is not a natural person, a representative of that party with authority to resolve the dispute or, in the case of a governmental entity that requires an agreement to be approved by an elected official or a legislative body, a representative with authority to recommend such agreement, must attend all mediation sessions in person, unless excused or permitted to attend by telephone as provided in (3).

(2) If any party is insured under a policy of insurance that provides or may provide coverage for a claim that is a subject of the action, a representative of the insurer with authority to settle or recommend settlement of the claim must attend all mediation sessions in person, unless excused or permitted to attend by telephone as provided in (3).

(3) The mediator may excuse a party, attorney, or representative from the requirement to attend a mediation session under (1) or (2) or permit attendance by telephone. The party, attorney, or representative who is excused or permitted to attend by telephone must promptly send a letter or an electronic communication to the mediator and to all parties confirming the excuse or permission.

(4) Each party may have counsel present at all mediation sessions that concern the party.

(Subd (a) amended effective January 1, 2007; adopted as untitled subd effective March 1, 1994.)

(b) Participant lists and mediation statements

(1) At least five court days before the first mediation session, each party must serve a list of its mediation participants on the mediator and all other parties. The list must include the names of all parties, attorneys, representatives of a party that is not a natural person, insurance representatives, and other persons who will attend the mediation with or on behalf of that party. A party must promptly serve a supplemental list if the party subsequently determines that other persons will attend the mediation with or on behalf of the party.

(2) The mediator may request that each party submit a short mediation statement providing information about the issues in dispute and possible resolutions of those issues and other information or documents that may appear helpful to resolve the dispute.

(Subd (b) adopted effective January 1, 2007.)

Rule 3.874 amended effective January 1, 2007; adopted as rule 1634 effective March 1, 1994; previously amended and renumbered effective January 1, 2007.

Rule 3.875. Filing of statement by mediator

Within 10 days after conclusion of the mediation, the mediator must file a statement on *Statement of Agreement or Nonagreement* (form ADR-100), advising the court whether the mediation ended in full agreement or nonagreement as to the entire case or as to particular parties in the case.

Rule 3.875 amended and renumbered effective January 1, 2007; adopted as rule 1635 effective March 1, 1994.

Rule 3.876. Coordination with Trial Court Delay Reduction Act

(a) Effect of mediation on time standards

Submission of an action to mediation under the rules in this chapter does not affect time periods specified in the Trial Court Delay Reduction Act (Gov. Code, § 68600 et seq.), except as provided in this rule.

(Subd (a) amended effective January 1, 2007.)

(b) Exception to delay reduction time standards

On written stipulation of the parties filed with the court, the court may order an exception of up to 90 days to the delay reduction time standards to permit mediation of an action. The court must coordinate the timing of the exception period with its delay reduction calendar.

(Subd (b) amended effective January 1, 2007.)

(c) Time for completion of mediation

Mediation must be completed within 60 days of a reference to a mediator, but that period may be extended by the court for up to 30 days on a showing of good cause.

(Subd (c) amended and lettered effective January 1, 2007; adopted as part of subd (b) effective March 1, 1994.)

(d) Restraint in discovery

The parties should exercise restraint in discovery while a case is in mediation. In appropriate cases to accommodate that objective, the court may issue a protective order under Code of Civil Procedure section 2017(c) and related provisions.

(Subd (d) amended and lettered effective January 1, 2007; adopted as part of subd (b) effective March 1, 1994.)

Rule 3.876 amended and renumbered effective January 1, 2007; adopted as rule 1637 effective March 1, 1994.

Rule 3.877. Statistical information

(a) Quarterly information reports

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

- (1) The cost and time savings afforded by mediation;
- (2) The effectiveness of mediation in resolving disputes;
- (3) The number of cases referred to mediation;
- (4) The time cases were in mediation; and
- (5) Whether mediation ended in full agreement or nonagreement as to the entire case or as to particular parties in the case.

(Subd (a) amended effective January 1, 2007; previously amended effective February 9, 1999.)

(b) Submission of reports to the Judicial Council

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

(Subd (b) amended and lettered effective January 1, 2007; adopted as part of subd (a) effective March 1, 1994.)

(c) Parties and mediators to supply information

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

(Subd (c) amended and relettered effective January 1, 2007; adopted as subd (b) effective March 1, 1994.)

(d) Alternative reporting method

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

(Subd (d) amended and relettered effective January 1, 2007; adopted as subd (c) effective March 1, 1994.)

Rule 3.877 amended and renumbered effective January 1, 2007; adopted as rule 1638 effective March 1, 1994; previously amended effective February 9, 1999.

Rule 3.878. Educational material

Each court must make available educational material, adopted by the Judicial Council, or from other sources, describing available ADR processes in the community.

Rule 3.878 amended and renumbered effective January 1, 2007; adopted as rule 1639 effective March 1, 1994.