

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

LOS ANGELES

FALL 2020

THE LOS ANGELES SUPERIOR COURT'S MANDATORY SETTLEMENT CONFERENCE PROGRAM IN THE TIME OF THE PANDEMIC



Hon. Zaven V. Sinanian

The COVID-19 pandemic has affected every aspect of every courthouse operation in the United States and probably the world. Here in Los Angeles, Superior Court operations were largely suspended in March 2020, including the Mandatory Settlement Conference program. As we slowly resumed our court services, we were also able to restart the MSC

program by conducting remote conferences. Counsel have come to realize that it is almost an imperative to try to resolve their cases via private mediation or court-ordered settlement conferences to avoid trial delays.

Prior to the pandemic, only about 5% of civil cases ended up in trial. The vast majority of civil cases will continue to settle before trial. Most cases will settle by direct negotiations and a smaller number after successful dispositive motions. The cases that end up in private mediation will generally settle. Of those cases that will not or cannot settle via direct negotiations or private mediation, many will end up in court-ordered settlement conferences.

As it has done for many years, the court's MSC program assists individuals and businesses who have limited funds or are unable or unwilling to resolve their disputes through direct negotiations or private mediation. It is often the last stop before trial, when the uncertainty of outcome and rising costs of litigation may begin to overwhelm the litigants. The pandemic, however, has changed the way we conduct settlement conferences, because we can no longer meet in conference rooms at the courthouse but instead must hear our cases via videoconferencing platforms.

The loss in intimacy is difficult to replace. Prior to the pandemic, settlement conference participants sat in a small conference room to ensure privacy and confidentiality. In such settings, cases settled because of human interactions, sometimes beyond our control. The relationships that developed in private conference rooms, where litigants engaged in discussions with a sitting judge about sensitive issues, were crucial to facilitating resolution of disputes.

I firmly believe good rapport with litigants helps persuade them to view the settlement process as a better alternative to a trial. A few years ago, I settled a wrongful death case involving a teenager who died in an apartment fire. The parents of the child, recent immigrants from a developing country, needed a neutral who not only empathized with their loss but also could be trusted to explain in a calm and caring way the potential outcome of continued litigation. Having immigrated myself to America as a teenager with my family, I was able to make a unique connection with the family, which played a large role in building trust and confidence. It was critical to have experienced attorneys and a knowledgeable insurance adjuster who valued my thoughts on how to navigate the settlement conference. The parents were relieved when they were finally able to reach an agreement with the defendants. With tears in their eyes, they thanked me for helping them achieve closure. This result would not have been possible without the cooperation of counsel and the sound risk assessment of the insurance adjuster, with whom I had developed a professional relationship over the years. Most importantly, the entire conference happened in small, confined rooms, where privacy and confidentiality were protected.

Has the pandemic eliminated this kind of effective interaction? It has certainly changed the physical form and structure of settlement negotiations, both in the context of private mediations and court-ordered settlement conferences. But we are adapting to the new world of remote settlement conferences conducted via video conferencing platforms.

And I must admit, it is working well.

The participants do not have to travel long distances and risk contracting the virus. They don't have to fight traffic and pay exorbitant parking fees. They can be in a room with their counsel, if they choose to, or appear solo from a more comfortable location. The litigants are placed in separate "breakout rooms" to allow private discussions. In the typical two-party case, I like to create additional rooms—one for my chambers, where I will place myself when the parties need to confer, and another where the lawyers can meet privately. We do, however, miss the small talk that used to occur at the start of an in-person session, which can sometimes ease tensions: On video, after my introductory remarks about the process, we dive right into the factual and/or legal issues.

Especially with the restrictions imposed by the pandemic, lawyers must be fully invested in the MSC process to enable them to find creative ways to resolve disputes. Acting more as a counselor than as an advocate, a lawyer has to prepare the client for the kind of compromises that may have to be made to achieve closure at a settlement conference. Lawyers must treat the MSC as the last station before trial and prepare as though they are entering the trial phase. The MSC may be their last chance to avoid the risks and disappointments inherent in a trial. Lawyers must spend time with their clients to educate them about the process of negotiation and the objectives that can be achieved at a settlement conference. The potential disruptions that will affect businesses, which can sometimes lead to closures or bankruptcy, will require more effort to ensure an early settlement of a dispute. At the settlement conference, I try to emphasize to the parties not only what they might lose by proceeding to trial, but more importantly what they will gain by agreeing to resolve their dispute on their own negotiated terms.

One of the positive outcomes of the complicated future we now face will be learning to work together in ways that manage risk better and promote dialogue earlier in the litigation process. Civility, always expected before, will become even more critical for lawyers to be able to achieve the goals of their clients. The changes resulting from the pandemic will require a more accurate understanding of the needs and interests of the litigants.

As settlement judges of the MSC program, we have adjusted to the new reality and are here to help litigants resolve their disputes. Given the anticipated delays in jury trials, the settlement judges are taking on a greater responsibility of mediating disputes and repairing broken relationships. Here are some pointers for counsel:

- Parties who choose to engage in private mediation should do so prior to using our services.

- We prefer that you have a trial date set before you meet with us. Ideally, the MSC should happen 30 to 60 days prior to trial. The parties are more motivated to settle a case when trial dates are looming.

- There will undoubtedly be exceptions where cases will need early intervention, such as where there is a depletion of funds or where increasing litigation costs and attorney's fees, threaten to result in the demise of the company.

- Counsel must cooperate and collaborate to make the MSC a worthwhile engagement. I have always stressed to lawyers that it doesn't advance the goal of settlement when lawyers are angry, unreasonable and belligerent.

- Counsel may communicate jointly with the MSC judges prior to the videoconference to determine what the best framework is to improve the chance of success.

- The five-page settlement statements should provide a brief outline of the law/facts and a discussion of the prior settlement negotiations. The statements must be served on the opposing side to educate them about the issues to be discussed at the settlement conference.

- Preparatory meetings and settlement statements will save time and provide critical insight to the MSC judge, who will then be in a better position to persuade the parties to move in the right direction.

Undoubtedly, vaccines will bring back some normalcy to human life. But they will not guarantee the resumption of in-person sessions in the immediate future. It will take time to vaccinate large population sectors and to feel safe again, and we may encounter new challenges from persons who decline to receive the vaccination.

In the time of the pandemic, we must work together to come up with creative solutions to enable us to achieve timely resolution of legal disputes.

Hon. Zaven V. Sinanian is the Supervising Judge of the Los Angeles Superior Court's Judicial Mandatory Settlement Conference program.