

***MANDATORY SETTLEMENT CONFERENCES
AND MEDIATIONS IN CALIFORNIA STATE COURT:
Similarities and Crucial Differences***

By
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More than 95 percent of civil cases resolve before trial. Attorneys, mediators, and judges should strive to become skilled and knowledgeable about settlement techniques and strategies, as well as the body of law which has developed in this area. In particular, attorneys, mediators and judges should be aware of significant differences between mandatory settlement conferences (MSCs) and mediations. While there are many similarities in how these are conducted, there are also crucial differences which can impact the case, or the subsequent trial, if the case does not settle.

Preliminarily, the *approaches* and *techniques* employed by mediators and judges conducting MSCs and mediations are often the same. Mediators and judges begin with an analysis of the facts and the law, as presented to them in briefs submitted by the parties and in their own independent research and case preparation. By meeting with the parties separately, the mediator or judge may explore risks that each side bears, strengths and weaknesses of the cases, the impact of the law, and the likelihood of “success” and what that means. The mediator or judge draws upon the exchange of information to assist the parties reach a resolution and memorialize the settlement.

However, there are significant differences between a mandatory settlement conference and a mediation. Regrettably, judges, mediators, and attorneys use the terms interchangeably and often fail to distinguish between an MSC and a mediation.

A court may order one (or more) settlement conferences in any case. And, at the request of any party, a court may set a settlement conference. (California Rule of Court 3.1380 subd. (a).) Generally, a court *may not* order parties to mediation. The California Supreme Court teaches us time and again that mediation is a voluntary process. Thus, if the parties wish to engage in mediation, they may do so voluntarily, but the court cannot order them to mediation. One outlier probate case affirmed a trial court ordering parties to mediation in the context of a probate dispute involving multiple charitable beneficiaries. (*Breslin v. Breslin* (2021) 62 Cal.App.5th 801—opinion by Justice Gilbert with Justice Tangeman dissenting.) A court cannot order parties to pay for a private mediation because that conflicts with the statutory scheme that mediation is voluntary. (*Jeld-Wen, Inc. v. Superior Court* (2007) 146 Cal.App.4th 536.)

At a mandatory settlement conference, the following individuals *must personally* attend the MSC (California Rule of Court 3.1380 subd. (a)):

- *Trial counsel*

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- Parties
- Persons with full authority to settle

Five days in advance of a mandatory settlement conference, California Rule of Court 3.1380 subd. (c) provides the following must be provided:

1. A good faith settlement demand
2. An itemization of economic and noneconomic damages
3. A good faith offer of settlement by each defendant; and
4. A statement addressing all facts and law pertinent to liability and damages.

The Advisory Committee Comment to California Rule of Court 3.1380 notes the persistent confusion between mandatory settlement conferences and mediations. It states:

To prevent confusion about confidentiality of proceedings, it is important to distinguish between settlement conference held under this rule and mediation. The special confidentiality requirements for mediation established by Evidence Code sections 1115-1128 expressly do not apply to settlement conferences under this rule.

This advisory note highlights the dangers of confusing a mandatory settlement conference with a mediation and points to the Evidence Code provisions which address confidentiality in the context of a mediation. Moreover, Rule 3.1380 also points out that a court may not (1) appoint a person to conduct a settlement conference at the same time that person is serving as a mediator in the same action, or (2) appoint a person to conduct a mediation under Rule 3.1380.

Some counties, such as San Francisco, provide that judges may also conduct mediations. In San Francisco, parties may request a settlement conference or a judicial mediation by contacting the court's Alternative Dispute Resolution Coordinator at adrcoordinator@sftc.org.

California Code of Judicial Ethics Canon 3 B(12) provides that a judge may participate in settlement conferences or in other efforts to resolve matters in dispute including matters pending before the judge. The consent of the parties or their lawyers is required to permit a judge to confer separately with the parties and/or their lawyers during resolution efforts. A disqualified judge may still hear a settlement conference (California Code of Civil Procedure § 170.4) although most judges decline to do so to avoid even the appearance of bias or favoritism.

The main consideration for parties as to whether they are in settlement conference or in mediation lies in the confidentiality provisions emblazoned in the Evidence Code. Compare the following:

Settlement Conference: Settlement conferences are governed by **California Evidence Code section 1152** which provides: "Evidence that a person has, in

compromise, or from humanitarian motives, furnished or offered or promised to furnish money *is inadmissible to provide liability* for the loss or damages.” (Emphasis added.)

Mediation: Mediations are governed by **Evidence Code section 1119** which provides:

- No evidence or anything said or any admissions made in the course of or pursuant to mediation or a mediation consultation is admissible or subject to discovery.
- No writing prepared for purpose of, or in the course of, a mediation or a mediation consultation is admissible in discovery and may not be compelled.
- All communications, negotiations or settlement discussions among participants are confidential.

Thus, the Evidence Code attaches significant evidentiary consequences depending upon whether the parties are in a mandatory settlement conference or in a mediation. When a case does not settle, these evidentiary rules often play out in motions such as summary judgment/adjudication, motions *in limine*, and at trial when a party seeks to introduce or refer to documents or statements identified or produced in the course of settlement conference or mediation. As is apparent, section 1152 is narrowly drawn, while section 1119 is extremely broad. In numerous cases, the California Supreme Court has emphasized the breadth and sanctity of mediation confidentiality as codified in Evidence Code section 1119.

Keep in mind that parties *can stipulate* to greater confidentiality as to matters discussed or exchanged in a mandatory settlement conference. However, it is up to the parties to raise the issue and reach a stipulation *before* the settlement conference. Absent a stipulation, the limited confidentiality of Evidence Code section 1152 controls.

Other sections of the Evidence Code are designed to emphasize this distinction. Attorneys are bound by certain requirements. California Evidence Code section 1129 provides that an attorney representing a client in a mediation, shall, as soon as reasonably possible before the client agrees to participate in a mediation consultation provide that client with a printed disclosure containing the confidentiality acknowledgement signed by the client that the client has read and understands the confidentiality restrictions. (Section 1129 subd. (a).)

The “mediation consultation” referred to in 1119 is defined in Evidence Code section 1115 subd. (c):

Mediation consultation,” means a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.”

California Evidence Code defines when a mediation begins and ends. As is evident from the definition in section 1115 subsection (c), the confidentiality of mediation attaches with the very first communication between a person and a mediator—and it covers initiating, considering, or reconvening a mediation, or retaining the mediator. This definition is extremely broad.

The California Evidence Code also defines when a mediation ends. Section 1125 provides that a mediation ends:

- When the parties execute a written settlement agreement that fully resolves the case; or
- An oral agreement that fully resolves the case is reached as per § 1118; or
- The mediator provides the participants with a writing signed by the mediator that the mediation is terminated; or
- A party provides a writing that the mediation is terminated' or
- For 10 calendar days there is no communication between the mediator and any of the parties.

Attorneys, mediators, and judges should be aware of the distinctions between mandatory settlement conferences and mediations. The distinctions should be carefully explained to clients ahead of time. If a case does not settle, attorneys should anticipate evidentiary issues which may arise at later stages of the case, including trial. Attorneys and judges should be familiar with the California Rules of Court and Evidence Code provisions applicable to MSCs and mediations. And, judges should be prepared to rule upon address evidentiary objections which arise in subsequent motions, motions *in limine*, and during trial.