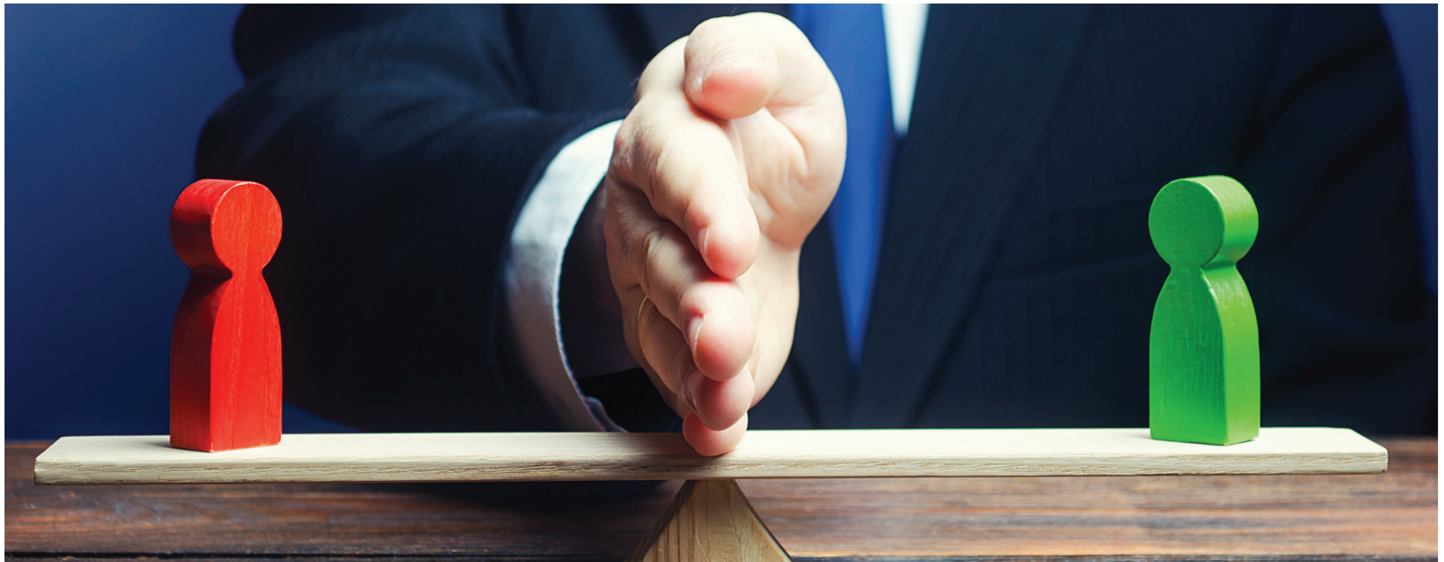
Hon. Dalila Corral Lyons (Ret.)
MEDIATOR, SIGNATURE RESOLUTION

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2023



Mandatory settlement conferences are not mediations

KNOWING THE DISTINCTIONS, ESPECIALLY ON CONFIDENTIALITY, CAN HELP MOVE YOUR CASE TOWARDS SETTLEMENT

While the primary goal of both a mediation and a mandatory settlement conference (MSC) is the same – to settle a case – there are important differences between the two. Knowing those differences can help attorneys successfully settle their cases in either forum. More importantly, fully understanding and appreciating how the two processes diverge may help ensure the enforceability of any resulting settlement agreements.

This article will discuss practical issues I found myself addressing when I served as a settlement judge conducting MSCs in Los Angeles Superior Court, as well as the insights I've gained as a neutral conducting private mediations.

Confusion

During the MSCs I presided as a judge, I frequently observed counsel's confusion regarding the distinction between the two processes. They would, without thinking, refer to MSCs as mediations, even at times labeling their MSC statements "Mediation Briefs." Counsel would also mark their MSC statements "confidential" and not share them with opposing counsel.

It must have appeared to the attorneys in my MSCs that I was a stickler for using precise language, and I'll admit that I was. There are important reasons for distinguishing between the two types of settlement hearings, particularly concerning the shield of confidentiality – a benefit that applies to mediations but does not encompass MSCs.

The confusion among attorneys is not surprising. There are few reported cases explaining the differences between an MSC and a mediation. In *Raigoza v. Betteravia Farms* (1987) 193 Cal.App.3d 1592), the court explained at least one of the obvious differences – MSCs are conducted by sitting judges at no cost to the litigants while mediations are conducted by retired judges (or attorneys) for a fee – but neither caselaw nor literature fully explicates the full list of distinctions between these two settlement vehicles. This article will attempt to fill that void.

Confidentiality

Evidence Code section 1117(b)(2) expressly excludes MSCs from the mediation rules governing confidentiality

This fact can be a shocker for attorneys who assume their MSC sessions will be protected from disclosure. Unless stipulated otherwise, their MSC statements, as well as all other documents and writings generated during the course of the MSC, may be admitted at trial or otherwise made subject to disclosure.

Confidentiality is a core tenet of mediation

It significantly promotes communication between the parties and their mediator and thus can facilitate the resolution of even the most difficult cases. When parties feel comfortable opening up and sharing sensitive matters with the mediator, the mediator, in turn, has deeper insights into what is driving their demands. They can then work with both sides to structure a settlement that addresses these fundamental issues. In the case of *Rojas v. Superior Court* (33 Cal.4th 407), the California Supreme Court acknowledged this dynamic when it observed that "confidentiality is essential to effective mediation."

Mediations are governed by the broad rules of confidentiality set forth in Evidence Code sections 1115 through 1129, which specifically address communications made during mediation proceedings. The law provides that unless

the parties agree otherwise, statements and other communications made during a mediation may not be disclosed outside the mediation.

Evidence Code section 1122 provides that a communication or writing made or prepared for the purpose of, in the course of, or pursuant to a mediation or mediation consultation is admissible in court or otherwise disclosable only if all parties expressly agree to its disclosure. It may also be disclosed if it was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree to its disclosure, and it does not disclose anything said or done or any admission made in the course of the mediation. The communication or writing, scrubbed of mediation details, may also be used for attorney discipline and compliance purposes.

Different confidentiality rules for MSC

MSCs, in contrast, are subject to different confidentiality rules. These court-mandated hearings are governed by rules 222 and 3.1380 of the California Rules of Court, which sets the framework for MSCs but does not address matters such as confidentiality. In Los Angeles, MSCs are also subject to Local Rule 3.25(d), which simply lays out the process for conducting the sessions.

Unlike a mediation, for which confidentiality is a fundamental requirement, an MSC is subject to the far more limited confidentiality rules of Evidence Code section 1152, which excludes from evidence offers of compromise and negotiation of offers of compromise to prove liability for the loss or damage. Although this confidentiality rule is often referred to as a "privilege," it is simply an evidence-preclusion rule. Federal Rule of Evidence 408 similarly deals with offers to compromise, excluding from evidence compromise offers, statements, and conduct.

While the parties in an MSC may agree to confidentiality terms as protective as those provided in mediations, such confidentiality is not a requirement under the Evidence Code. For example, in the Los Angeles Superior Court stipulation (LASC Form no. CIV 287), the parties may stipulate to treat as "confidential information" the "contents of any written Settlement Conference statements, anything that was said, any position taken, and any view of the merits of the case expressed by any participant in connection with any Settlement Conference."

Neutral immunity

Both the MSC settlement judge and the mediator are governed by Evidence Code section 703.5. With limited exceptions, neither an MSC judge nor a mediator is considered competent to testify in a proceeding as to any statement, conduct, decision, or ruling occurring at or in conjunction with the MSC or mediation. This provides protection in both types of proceedings against disclosure by the judge or neutral, but it does not afford any additional confidentiality shield for MSC communications.

Mandatory vs. voluntary

One of the salient differences between MSCs and mediations is that MSCs are mandatory, while mediations are voluntary. This distinction may seem innocuous, but it will become clear how impactful it can be.

In an MSC, the parties must be ordered by the court to appear and pursue settlement of their dispute. An MSC may be ordered at the request of the parties or on the court's own motion. (LASC Local Rule 3.25(d).)

When a judge orders a case to an MSC but the parties are not ready to engage in meaningful negotiations, the litigant should inform the judge. It serves no purpose to conduct an MSC that has no chance of resolution. Where an MSC presents a good opportunity for the parties to resolve their dispute, they should agree upon the optimal time frame for working toward a settlement.

Because an MSC cannot be conducted on a matter that has not been filed in court, the parties might decide to go to mediation before filing the lawsuit. At other times, it may be best for them to schedule the MSC or mediation only after key depositions have been taken.

The intent of MSC proceedings is essential to move as many cases as possible out of the judicial system by encouraging parties to resolve their disputes through settlement. This saves precious court resources and reduces the backlog of cases against which courts struggle. Programs such as Resolve Law Los Angeles support this mission by using qualified attorneys as volunteer settlement officers for MSCs mandated by the superior court.

Mediations, on the other hand, are completely voluntary and within the control of the parties and their counsel. Because disputing parties in mediation have chosen to bring their case to a mediator, the likelihood is generally greater that they will resolve the dispute. With the support of counsel and the mediator, the parties have a strong foundation for negotiating and structuring a settlement agreement that satisfies their unique issues and concerns.

Sharing briefs with opposing counsel

When an MSC is mandated, rule 3.1380(a) of the California Rules of Court requires that MSC "statements" (not briefs) be submitted (not filed) to the court and that they be served on opposing counsel five court days prior to the MSC. Marking an MSC statement "confidential" may appear to the judge that it was not served on opposing counsel, as required. This may delay the process of obtaining compliance with the service requirement.

In a mediation, the briefs are not required to be shared with opposing counsel. Such briefs are, as noted above, considered confidential. If parties in an MSC want to provide the settlement judge with a confidential statement, they must lodge a confidential brief with the settlement judge in addition to the non-confidential statement shared with opposing counsel.

Although it is not a requirement for mediation, many mediators favor exchanging briefs between the parties, just as is required in an MSC. They believe this can expedite the process by better focusing on the mediation. When the parties are familiar with the other sides' positions, they may be more open to compromise and settlement of contentious issues.

Just as in an MSC, parties in mediation may orally share their confidential information with the neutral. Counsel should give careful consideration before sharing all or some of the facts or arguments with opposing counsel. It may not be wise to share certain facts with the other side, but opening up to the neutral can facilitate meaningful negotiations. When the mediator fully understands what matters to a party and has that party's consent, they can share with the opposing side crucial information that can help break down roadblocks and reach a resolution.

Content of briefs

In MSCs, the content of the "briefs" submitted to settlement judges is dictated by California Rules of Court, rule 3.1380(a), which provides that an MSC "statement" must contain a good-faith settlement demand; an itemization of economic and noneconomic damages by each plaintiff; a good-faith offer of settlement by each defendant; and a statement identifying and discussing in detail all facts and law pertinent to liability and damages in the case as to that party.

According to Local Rule 3.25(e) of the Los Angeles Superior Court, written statements submitted to the court "must contain a concise statement of the material facts of the case and the factual and legal contentions in dispute." It must identify all parties and their capacities, contain citations of authorities, and list all damages claimed.

Los Angeles Superior Court judges generally limit the MSC statement to five pages, exclusive of exhibits, and the statement must bookmark exhibits with reference to the relevant pages in the exhibit and highlight the relevant section.

There are no such rules or orders for mediation briefs. Briefs are often submitted in a single-spaced letter format, and they can be of any length and include as much or as little information as the parties choose to share.

Who can attend

For MSCs, California Court Rules provide that trial counsel, parties, and persons with full authority to settle the case must personally attend the MSC, unless excused by the court for good cause. If any consent to settle is required for any reason, the party with that consensual authority must be personally present at the MSC.

Under Local Rule 3.25(d) of the Los Angeles Superior Court, unless expressly excused for good cause by the judge, all persons whose consent is required to effect a binding settlement must be personally present at the MSC, including parties, insurance adjusters, and entity party's representatives.

Attendance by a required person will only be excused if the judge approves a stipulation or an ex parte application.

In contrast, nobody is ordered or required to attend a mediation. However, for a mediation to truly be productive, attorneys and all parties should appear or, at a minimum, be on call. However, having parties on call is generally disfavored by some mediators, who prefer that they have the opportunity to connect with and communicate in real time with the parties.

Can a party bring a support person to an MSC or a mediation? For mediation, there is no problem including support people. At an MSC, however, a party must request permission from the settlement judge before including a support person. That person must be bound by any confidentiality provisions of the proceeding via a stipulation so that they don't proceed to post on social media or elsewhere what was said during the MSC.

Both the settlement judge and the mediator ultimately want to settle the case before them. If a support person will help in obtaining that result, generally their participation will be welcomed. When conducting MSCs, I often granted these requests. Support persons were frequently critical to reaching an agreement.

Length of proceedings

In Los Angeles, MSC judges typically conduct two MSC sessions a day, each three-and-a-half hours. Under certain circumstances, the participants may request a one-day MSC. When I served as an MSC judge, I liberally granted such requests in complex matters or those involving numerous parties. Because settlement judges are often crunched for time, given the high volume of cases before them and two-a-day MSCs, they are rarely able to provide additional support to parties or their counsel.

In mediation, the process is far more liberal. Mediations are generally scheduled to consume one full day, although some neutrals will conduct half-day mediations. Given the longer duration of most mediations, mediators typically have more latitude to provide support to the parties, helping them prepare settlement agreements after reaching a consensus, and conducting pre-mediation conferences or post-mediation follow-ups.

Interpreters

The Los Angeles Superior Court provides interpreters in court proceedings to ensure meaningful participation in the judicial process for individuals with limited English proficiency. (See Gov. Code, § 68092.1.) In MSCs, if the parties request an interpreter, the court must provide one at the court's expense. That interpreter must be certified or registered with the Judicial Council of California.

In mediation, parties requiring language assistance must provide and pay for their interpreters. Mediators may have rules about whether the interpreter must be certified, but no law sets such requirements. As such, it might be

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2023

possible for a party to bring a friend or relative to serve as the interpreter, as long as that party assumes all risks associated with mistranslation or misinterpretation of communications during the mediation. If a non-certified interpreter is used in the mediation, counsel may want to consider having a certified interpreter translate the settlement agreement.

Foreign language

MSCs are judicial proceedings governed by Code of Civil Procedure section 185, subdivision (a), which requires that all proceedings be conducted in English. Even if all participants in an MSC, including the settlement judge, speak the client's foreign language, they must still conduct the proceeding in English. (Code of Civ. Proc., §§ 20-23, and *American Corporate Security, Inc. v. Su* (2013) 220 Cal.App.4th 38.)

In mediation, on the other hand, there is more leeway to depart from English. The entire proceeding may be conducted in a foreign language spoken or understood by the counsel, parties, and mediator. It can be extremely productive to communicate in the client's native language if they are non-English speakers, with the consent of counsel. Since I speak Spanish fluently, I find that communicating in Spanish with a Spanish-speaking client is much more productive, as they are fully engaged, which facilitates settlement.

Costs

MSCs are provided at no expense to litigants. Mediations, in contrast, involve private neutrals whose services are not inexpensive. It might seem like a simple choice, but the calculus is more complex than dollars and cents.

MSCs are mandated by the court and thus are not always successful, but they can be an important equalizer in the pursuit of justice. MSCs offer an avenue for settling disputes for litigants of limited means who may not be able to afford mediation. But MSCs are subject to time restrictions, regulatory, and other constraints that could sometimes impede full resolution of legal matters.

When litigants invest in mediation, they have a horse in the race and should be motivated to work toward settlement. Longer sessions and confidentiality encourage greater candor and openness toward compromise. And without the limits attendant on judicial proceedings, mediators can suggest more creative solutions to the parties and explore alternative approaches to resolving their disputes.

Conclusion

The distinctions between mediations and MSCs may appear at first blush to be mostly academic or ministerial, but they can be very significant. Using precise terms to distinguish the two processes is important, particularly as to the key distinction of confidentiality. A full appreciation of each process's rules, procedures, and nuances can further the likelihood of settlement in either forum. Most importantly, understanding the distinction may ensure the enforceability of the settlement agreement.

Hon. Dalila Corral Lyons (Ret.) is a neutral with Signature Resolution. *She served 18 years on the bench of the Los Angeles Superior Court, the last three years as a full-time judge conducting mandatory settlement conferences. Judge Lyons was appointed by the California Supreme Court Chief Justice as a member of the California Judicial Council, the policy-making board for the judicial branch. dlyons@signatureresolution.com.*