



ADR Services, Inc. Presents

Mediation vs. MSC

What's the Difference?

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Complimentary In-House CLE Program

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What we will cover

A practical roadmap for the next 60 minutes

1

Differences

How mediation and mandatory settlement conferences differ.

2

Protections

The confidentiality provisions that apply to each

3

Practice

Practical tips for participating in each

❓ AUDIENCE POLL

Who has read and is familiar with Evidence Code §1115, et seq.? How about Evidence Code §1152?

How mediations and MSCs differ

MEDIATION

- voluntary
- can be done anytime
- prehearing discussion with the neutral
- generally have far more time.

MANDATORY SETTLEMENT CONFERENCE

- compelled
- typically set close to trial
- Rule of Court 3.1380
- generally have less time



"It's settlement, so it's all
confidential ... right?"



The Statutory Map

Start by identifying the setting — then identify the governing rule

PRIVATE MEDIATION

Neutral facilitates agreement

§§1115–1129

Mediation chapter

Core confidentiality protection under §1119; exceptions and admissibility rules within the chapter.

RULE 3.1380 MSC

Court settlement conference

§1117(b)(2)

Express carve-out

The mediation chapter does not apply to a settlement conference conducted under Rule 3.1380.

INFORMAL NEGOTIATION

Counsel / parties negotiate

Compromise evidence

§1152

Offers, conduct, and statements in compromise negotiations are inadmissible when offered to prove liability for the loss.

Full text of code sections available in handout materials.

MEDIATION

Evidence Code §§ 1115–1129 creates a broad, statutory confidentiality.

Section 1119(a):

No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery . . .

Key authorities: Evid. Code §§ 1117, 1119, 1152; Cal. Rules of Court, rule 3.1380.

MEDIATION

§1117(b) expressly excludes mandatory settlement conferences

Section 1117(b):

This chapter does not apply to... [a] settlement conference pursuant to Rule 3.1380 of the California Rules of Court.

Key authorities: Evid. Code §§ 1117, 1119, 1152; Cal. Rules of Court, rule 3.1380.

Mediation: the core confidentiality framework

§1115 — What counts as mediation

A neutral facilitates communication between disputants to assist them in reaching a mutually acceptable agreement.

§1119(a) — Statements & admissions

Things said or admissions made for the purpose of, in the course of, or pursuant to mediation are inadmissible and not subject to discovery.

§1119(b) — Writings

Writings prepared for the purpose of, in the course of, or pursuant to mediation are inadmissible and not subject to discovery.

§1119(c) — Communications among participants

Communications, negotiations, and settlement discussions by and between participants in the course of, or in furtherance of, mediation remain confidential.

Full text of code sections available in handout materials.

Additional Provisions:

1. Evidence Code §703.5 sharply limits mediator testimony in a subsequent proceeding.
2. Evidence §1129 requires that attorneys provide clients a written mediation-confidentiality disclosure before mediation. However . . .



Three important mediation safeguards beyond §1115, et seq.

§1120 — otherwise admissible evidence

- Evidence does not become protected merely because it was introduced or used in mediation.
- Preexisting documents and underlying facts can remain admissible or discoverable outside mediation.
- Physical objects are not transformed into protected "writings" by use at mediation.
- *Rojas and Wimsatt* illustrate the line between protected mediation material and independent evidence.

§703.5 + §1129 — people & process

- §703.5 sharply limits a mediator's ability to testify later about statements or conduct connected with the mediation.
- §1129 requires counsel, subject to statutory exceptions, to give the client the prescribed mediation-confidentiality disclosure before the client agrees to participate.
 - Counsel must obtain the client's signed acknowledgment that the confidentiality restrictions were read and understood.
 - The disclosure requirement does not itself create an exception to §1119.

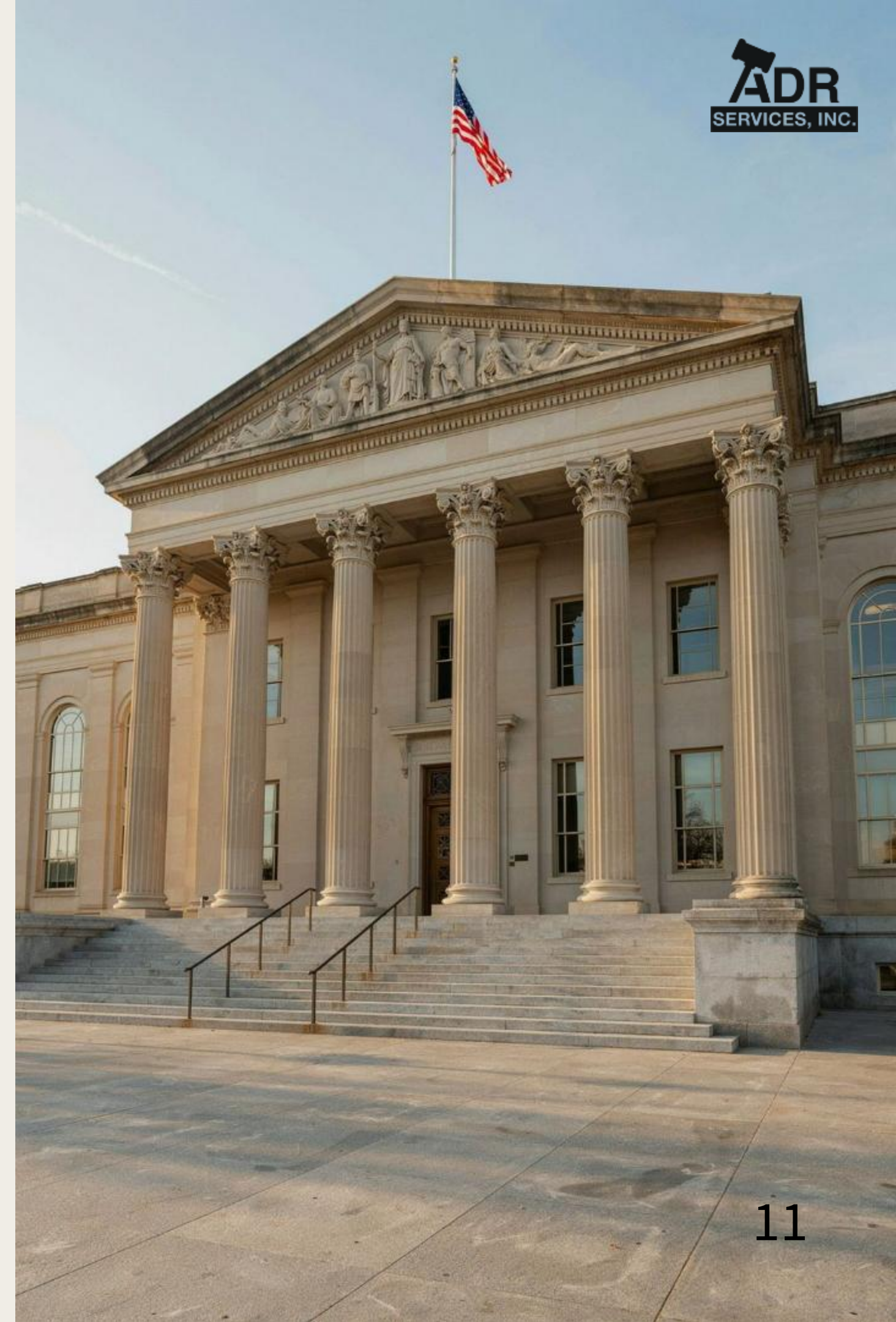
Authorities: Evid. Code §§703.5, 1120, 1129; *Rojas v. Superior Court*; *Wimsatt v. Superior Court*.

Mandatory Settlement Conferences

Recall:

Section 1117(b):

This chapter *does not apply* to... [a] settlement conference pursuant to Rule 3.1380 of the California Rules of Court.



Mandatory Settlement Conferences

EVIDENCE CODE §1117(b)(2)

The mediation chapter does not apply to a settlement conference under Rule 3.1380.

Rule 3.1380 — Court-controlled process

The court may set a mandatory settlement conference and require party/counsel participation consistent with the rule and applicable local requirements.

MSC statement — Check statewide + local rules

Confirm deadlines, required contents, whether the statement is served or filed, page limits, and any judge-specific procedures.

Advisory comment — Avoid confusing mediation and MSCs

The rule's commentary expressly recognizes that mediation confidentiality statutes do not govern Rule 3.1380 settlement conferences.

BOTTOM LINE

An MSC can feel like a mediation in practice — but you cannot assume it receives §1119's blanket protection.

Mandatory Settlement Conferences

Rule of Court 3.1380

Advisory Committee Comment

[P]roblems have arisen in several cases ... when distinctions between different ADR processes have been blurred. To prevent confusion about the confidentiality of the proceedings, it is important to clearly distinguish between settlement conferences held under this rule and mediations. **The special confidentiality requirements for mediations established by evidence code sections 1115–1128 expressly do not apply to settlement conferences under this rule.**

Rule of Court 3.1380 -- Highlights

Persons who must attend:

- Trial counsel,
- parties, and
- persons with full authority to settle the case

Settlement conference statement:

Five days before the conference, each party must submit to the court **and serve on each party** a statement containing:

- A good faith settlement demand;
- An itemization of economic and noneconomic damages;
- A good faith offer of settlement by each defendant; and
- A statement identifying and discussing liability and damages.

Note: Must comply with local rules.

§1152 is not a substitute for §1119

§ 1152 | Evidence Of Compromise

- Protects discussion re compromise offers and negotiation statements *when offered to prove liability* for the loss
- Some evidence may be admissible for a different, relevant purpose
- Does not provide the same discovery protection as §1119
- Context and the reason the evidence is offered can control the result

Evidence Code Section 1152

(a) Evidence that a person has, in compromise ... furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, **is inadmissible to prove his or her liability** for the loss or damage or any part of it.

See Covell v. Superior Court; Volkswagen of America, Inc. v. Superior Court.

Compare this with the language in section 1119:

Section 1119(a):

No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery . . .

Key authorities: Evid. Code §§ 1117, 1119, 1152; Cal. Rules of Court, rule 3.1380.

The courts enforce mediation confidentiality broadly

Cassel v. Superior Court

§1119 applies broadly to communications among mediation participants.

Foxgate HOA v. Bramalea California

No judicially created "bad faith" exception: protected mediation communications could not be used to support sanctions.

Rojas v. Superior Court

"Writings" include derivative materials such as charts, diagrams expert opinions and reports and are inadmissible and not discoverable under section 1119. However physical objects are not protected because they are not "writings."

Simmons v. Ghaderi

Strict enforcement; an oral settlement agreement made in mediation that did not satisfy statutory requirements was inadmissible and unenforceable.

Amis v. Greenberg Traurig LLP

Communications among mediation participants may remain protected even when made outside the mediator's presence if materially related to the mediation.

Eisendrath v. Superior Court

Communications among mediation participants may remain protected even when made outside the mediator's presence if materially related to the mediation.

The limits of Evidence Code §1152

§1152 is an exclusionary rule for a particular use — not blanket confidentiality as in mediation.

Covell v. Superior Court

Are settlement communications shielded from discovery? No. In *Covell*, malpractice plaintiff was not required to respond to questions in deposition about settlement discussions in underlying action. But see *Volkswagen*.

Truestone + Moving Pictures

Independent factual admissions may fall outside §1152 when they are separable from the compromise offer or offered for another proper purpose.

❓ PRACTICE QUESTION

Before putting a fact into an MSC statement or settlement communication, ask: "Could this statement later be offered for a purpose other than proving liability or the amount of the claim?"

Section 1152 . . . further limits:

Mangano v. Verity, Inc.

Pre-litigation offer of severance package in exchange for waiver of right to sue inadmissible "for purposes of establishing liability" but not inadmissible if offered for some other purpose.

Arave v. Merrill Lynch

Pre-litigation demand letter not an offer to compromise and therefore not inadmissible.

Caira v. Offner

Email offer to compromise inadmissible to prove liability. The court emphasized the "public policy in favor of promoting candor during settlement negotiations."

Section 1152: Specific Limitations

Settlement discussions may be admissible:

In subsequent defamation action where the negotiations in the underlying action included an acknowledgment that claim was false. *Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App. 3rd 1009, 1023.

With respect to later added claim for breach of the covenant of good faith and fair dealing. *White v. Western Title Insurance Co.* (1985) 40 Cal. 3rd 870.

In trial over accident injuries, where the settlement communications at issue related to subsequent, unrelated accident. *Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471.



A settlement reached in mediation needs an admissibility path

The key drafting question is not only "Did we settle?" — it is "Can this agreement be used to prove the settlement?"

1

Written & signed

Reduce material terms to a writing signed by the settling parties.

2

Use §1123 language

State that the agreement is admissible / subject to disclosure, or enforceable / binding, or otherwise satisfy §1123.

3

Oral agreement?

If relying on an oral agreement, satisfy the specific recording and enforceability requirements of §1118.

❏ CASE LESSON

***Simmons v. Ghaderi*: strict confidentiality can make an informal mediation settlement unusable if the statutory admissibility requirements are not met.**

Confidentiality of settlement terms is a separate question

Do not confuse confidentiality of the mediation process with enforceability of a nondisclosure clause in the resulting settlement.

CCP §1001 — Harassment / discrimination / retaliation claims

A settlement provision generally may not prevent or restrict disclosure of factual information related to specified sexual assault, harassment, discrimination, or retaliation claims. The settlement amount may still be kept confidential.

§1001(c) — Government agency / public official

The claimant may request protection of identity and identifying facts in covered matters — but that identity-shielding exception does not apply when a government agency or public official is a party.

CCP §1002 — Specified sexual-assault actions

For specified sex-offense and sexual-assault civil actions, settlement provisions barring disclosure of factual information are prohibited, subject to limited protection for certain victim information.

DRAFTING POINT

Ask two different questions: (1) Was the negotiation protected? and (2) Is the confidentiality term in the final agreement enforceable?

Current statutory references: Code Civ. Proc. §§1001–1002.

Release agreements vs. pre-trial demand letters

The document's function matters: resolving a claim is different from proposing a compromise.

Final release / settlement agreement

A signed agreement memorializes the bargain. It may be relevant to contract formation or enforcement even though the negotiations leading to it were compromise discussions. If reached in mediation, §1123 governs the admissibility path.

Pre-trial demand letter

§1152 protection turns on whether the communication is genuinely part of compromise negotiations. A "demand" label alone does not necessarily insulate independent factual statements. See *Arave v. Merrill Lynch*

Demand made only in mediation

The supplied research flags an unresolved policy-limits question: if the demand existed only as a mediation communication, §1119 may prevent later use even where the demand would otherwise matter to a bad-faith theory.

❓ **PRACTICE QUESTION**

Practice point: before sending a demand, identify the forum, the compromise purpose, and whether you may later need to prove that the demand was made.

Can you carry mediation information into a later MSC?

MEDIATION



Protected communications /
writings

LATER MSC



Different confidentiality
regime

TRIAL?



Future use

❏ RULE OF THUMB

The later MSC does not erase or waive §1119 protection for an earlier mediation. Do not repeat protected mediation communications unless a statutory exception or valid waiver applies.

❓ WHAT CAN BE DISCUSSED?

It is unclear . . . but underlying facts and otherwise admissible evidence may still be usable; the protected mediation communication about those facts is a different matter.

When settlement evidence comes back into the case

HAWRAN v. HIXSON

Different purpose, different result

§1152 did not bar settlement-related evidence offered to establish a separate alleged contractual obligation rather than liability on the compromised claim.



Takeaway

Ask why the evidence is being offered — not merely where it arose.

DIAMOND v. RESHKO + CACI 217

Settling co-defendant testimony can change the analysis

Evidence of a plaintiff's settlement with one or more defendants may be admissible to show witness bias or prevent collusion when a settling defendant participates at trial.



Takeaway

Settlement evidence can be relevant to credibility even when it cannot be used to prove liability.

Quick issue-spotting: what happens next?

A

A mediation brief admits a damaging timeline fact. Opponent wants it at trial.

ISSUE: §1119 / Rojas / Cassel

B

A preexisting expert report is shown to the mediator. Opponent later seeks the original report.

ISSUE: §1120 / Rojas

C

An MSC statement says, "We owe \$100,000, but will pay \$60,000 to settle."

ISSUE: §1152 / Truestone

D

A settling co-defendant testifies at trial.

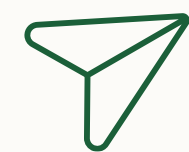
ISSUE: Diamond / CACI 217

Draft differently for mediation and for an MSC

MEDIATION BRIEF



Be Candid: Use the statutory regime to give the neutral meaningful risk analysis.



Control Sharing: Clearly mark what is mediator-only and what may be conveyed.



Preserve Admissibility: If settlement terms are reached, use §§1118/1123 correctly.

MSC STATEMENT



Assume Less: Do not draft as though §1119 applies.



Separate Facts from Offers: Avoid unnecessary factual admissions inside compromise language.



Check Procedure: Follow Rule 3.1380, local rules, and judge-specific requirements.

❏ BOTH SETTINGS

Give the neutral clear instructions about what can be shared, who holds settlement authority, and when sensitive information should be disclosed.

Case citations [other references]

Authorities referenced in the research materials and presentation

- *Amis v. Greenberg Traurig LLP* (2015) 235 Cal.App.4th 331
- *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.* (2008) 163 Cal.App.4th 566
- *Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App. 3rd 1009, 1023.
- *Cassel v. Superior Court* (2011) 51 Cal.4th 113
- *Covell v. Superior Court* (1984) 159 Cal.App.3d 39
- *Diamond v. Reshko* (2015) 239 Cal.App.4th 828
- *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351
- *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1
- *Hawran v. Hixson* (2012) 209 Cal.App.4th 256
- *In re Marriage of Woolsey* (2013) 220 Cal.App.4th 881
- *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116
- *Kurtin v. Elieff* (2013) 215 Cal.App.4th 455
- *Moving Pictures Etc. Union v. Glasgow Theatres, Inc.* (1970) 6 Cal.App.3d 395
- *Olam v. Congress Mortgage Co.* (N.D. Cal. 1999) 68 F.Supp.2d 1110
- *Radford v. Shehorn* (2010) 187 Cal.App.4th 852
- *Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155
- *Rojas v. Superior Court* (2004) 33 Cal.4th 407
- *Simmons v. Ghaderi* (2008) 44 Cal.4th 570
- *Truestone, Inc. v. Simi West Industrial Park II* (1984) 163 Cal.App.3d 715
- *Volkswagen of America, Inc. v. Superior Court* (2006) 139 Cal.App.4th 1481
- *White v. Western Title Insurance Co.* (1985) 40 Cal. 3rd 870
- *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137
- *Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471

See also CACI No. 217 (Evidence of Settlement); Weil & Brown, *California Practice Guide: Civil Procedure Before Trial* (TRG 2026), Ch. 12; Judges Benchbook, *Civil Procedure Before Trial*, Ch. 5 (Thompson Reuters); Hon. Edward Weil (Ret.), *Are Settlement Talks Confidential*, *Daily Journal* (December 2, 2009).

Thank You.



Hon. Jo-Lynne Lee (Ret.)

Hon. Jo-Lynne Lee (Ret.) brings over 40 years of legal experience to her role as a mediator, arbitrator, and discovery referee, including more than two decades on the Alameda County Superior Court. Appointed in 2002, she was the first Asian American woman to serve on that bench and became known for her calm, focused, and pragmatic approach to complex civil litigation. Judge Lee has deep experience resolving personal injury, wage and hour, mass tort, employment, business, and construction disputes, including hundreds of mediations conducted during her judicial assignment to the court's settlement department. She is especially skilled at managing emotionally charged matters, navigating impasse, and translating complex technical issues into clear, practical resolutions.

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Hon. James "Reg" Reilly (Ret.)

Hon. James "Reg" Reilly (Ret.) brings more than 30 years of experience as a civil litigator, law firm leader, and judicial officer, including service as Supervising Judge of the Settlement Department for the Alameda County Superior Court. Over the course of his career, he has presided over hundreds of settlement conferences and handled complex business, product liability, personal injury, and professional negligence matters. Prior to taking the bench, he served as Managing Partner of Gordon Rees' San Francisco office and acted as coordinating counsel in nationwide litigation involving pharmaceutical and medical device claims. Known for his practical, resolution-focused approach, Judge Reilly combines deep litigation experience with judicial perspective to help parties realistically assess risk and move difficult cases toward settlement.

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