A GENERAL COMPARISON OF MANDATORY SETTLEMENT CONFERENCES VERASUS MEDIATIONS

by MICHAEL G. BALMAGES

Court rules differ, judges differ, court clerks differ, and lawyers differ, but there is one constant throughout California courts: most civil cases settle. I have heard estimates from various court officials putting the settlement range at 95% to 99.5%. In some types of cases, e.g. ADA cases, rear-enders, wage and hour, lemon law, and more, it seems like 100% of the cases settle. Many settlements are reached at or following mediation or mandatory settlement conferences. While these procedures seem the same, there are notable differences.

Mandatory Settlement Conferences (MSCs) are mostly a creature of state and local court rules. *See* California Rules of Court (CRC) § 31380; *and see, e.g.*, Local Rules of the Superior Court, County of Orange (OC Rules) § 316, Los Angeles County Court Rules (LA Rules) § 325(d), and Central District of California Local Civil Rules (CD Rules) § 16-15. Court-ordered or court panel mediations are also covered by court rules (see, e.g., CRC § 3.835, et seq., and OC Rules § 360(E)). Mediation rules are generally determined by the parties and/or the mediator subject to the mediation confidentiality provisions of the California Evidence Code. See Cal. Evid. Code §§ 703.5 and 1115-1128.

MSC Rules (CRC § 31380 (c); OC Rules § 316(B); LA Rules § 325 (e)) require briefs or settlement conference statements five court days before the conference); court panel mediations have similar requirements (CRC § 3.894(b)(2); Central District General Order 11-10 § 8.4.). Court rules also require that demands and offers be exchanged before the conference (OC Rules §§ 316(F)(1)(b) and 316(F)(2)(c)). There are no such rules for private, non-panel mediations, although good practice would be to provide a brief and a demand or offer prior to the mediation. In actual practice it is amazing how many MSCs and mediations commence with no prior demand being made, which makes settlement much less likely.

As to MSC briefs and statements, actual practice yields two prevailing patterns: one, counsel provides no brief regardless of the rule requirements, or two, counsel provides a thirty-page brief with dozens of exhibits that the temporary judge or other settlement officer will first see shortly before the MSC begins. As to the exchange of MSC statements and briefs, CRC section 3.1380(c) requires an exchange of settlement conference statements, while OC Rules section 316(B) seems to contradict this, saying that settlement conference statements are confidential.

In private mediations, counsel usually provide briefs but often not until the day before or the day of the mediation. Mediation counsel do not usually exchange briefs, although I personally encourage them to do so.

MSCs are court-ordered. Mediations are voluntary. Mediations can be court-ordered in that parties are often required to choose a form of ADR to be completed by a certain date. MSCs are compulsory by court rule (see above) or court order, although many courts also encourage voluntary settlement conferences.

MSCs are often set about thirty days before trial, when most of the work, except expert designations and depositions,

has been done. Whether setting a date this late affects the likelihood of a case to settle varies from case to case. Mediations can be scheduled at any time, often before the parties have spent a lot of money on the case. The impact of this "early" setting also varies from case to case. Sometimes the parties need to feel the "pain" of litigation before they believe their lawyers and the mediator who are saying that settlement is the way to go. MSCs and mediations set while MSJs and MSAs are pending often fail because each side is sure that they will prevail on the pending motions.

MSCs are held at the courthouse in chambers, jury rooms, small conference rooms, hallways, the cafeteria, or just about any place in the courthouse. Mediations are held in fancy private offices.

At MSCs, each party does not get its own separate room. Rather, the parties generally alternate being in with the judge or temporary judge and being out in the hallway or cafeteria. At mediations, each party usually gets its own room for the duration of the mediation and the mediator travels back and forth between the rooms.

MSCs typically take place in the morning for three hours or less. Mediations are usually a half day, a full day, or even several days. Sometimes the MSC judge handles more than one MSC concurrently. That rarely happens with mediations.

MSCs are free, or at least the judges are. Mediations are expensive. Private mediation rates range from a low of about $150 per hour to a high of about $1500 per hour. $600 to $700 per hour is common.

MSCs have cafeteria coffee, donuts, and sandwiches. Mediations are usually catered. One thing counsel love about mediations is the food.

At MSCs, the decision-makers are ordered to attend. At mediations, the decision-makers hopefully will attend. The hardest person to settle with is the person not in the room: the significant other, the boss, the adjuster, the adjuster's boss, the partner, the cousin/friend who is a lawyer, the trial lawyer. Judges can order a particular person or lawyer to be present; court rules usually require it. This is not so with private mediations. *See, e.g.*, OC Rules § 316(A), (G)(1)(a) and (b), (G)(2)(a) and (b); LA Rules § 325(d)(1), CRC § 3.1380(b); and CD Rules § 16-15(b).

MSCs are presided over by judges or temporary judges, who may or may not be charming. Mediations are conducted by a charming mediator. You usually do not get a choice as to your MSC judge, but you usually get significant input on who your charming mediator will be. Some attorneys prefer that the opposing side pick the mediator with the thinking that if it is someone the opposing side picks, that side will be receptive when that mediator tells that side that they have a bad case. Some counsel want their mediator to have subject-matter expertise but I feel that this is overrated. As a temporary judge and as a mediator, I have effectively handled and settled numerous cases outside my areas of practice. From my perspective, more important than subject matter expertise is law business expertise. This includes, trial experience, discovery experience, fee charging and collecting experience, judgment collecting experience, experience dealing with clients, experience with running a law practice, etc.

Judges can make orders. They can order parties and counsel to be present; they can order the MSC continued; they can sanction parties and counsel; and they can make case scheduling changes. Mediators cannot.

MSCs are presided over by judges or temporary judges, who may or may not be charming. Mediations are conducted by a charming mediator.

At MSCs the participants may not want to be there. At mediations the participants may want to be there. Often, at MSCs, counsel are just checking the ADR box. They do not have any great desire to be there. "I don't want to waste your time" is a common phrase MSC judges hear. At private, non-court-ordered mediations, the parties generally want to see if there is a path to resolution.

"Settlement conferences" themselves are not confidential. Instead, what is confidential are the parties' demands and settlement offers, which cannot be introduced at trial to prove liability under Evidence Code § 1152. *See also*, Evidence Code §§ 1152, 1154; Federal Rules of Evidence § 408. In contrast, the Evidence Code establishes broad confidentiality for mediations, covering anything that was said or done and prohibits the mediator from communicating with the court, absent consent of all parties. Evidence Code § 1121. Mediation confidentiality does not apply to MSCs. Evidence Code § 1117 (b). No evidence of anything said in the course of a mediation is admissible or subject to discovery. Evidence Code §1119 (a). This may be a distinction without a difference. Mediation confidentiality does not apply to MSCs, but I am unaware of any situation where something disclosed at an MSC has come into evidence absent some other basis for its admission.

At MSCs, a court reporter is often available to put the settlement on the record. At mediations, there is no court reporter. Absent a court reporter, it is best to get something signed. In cases where opposing counsel have worked with each other and have a degree of trust, they will often conclude an MSC or mediation without a record and wait for one party, usually the defense, to prep the "standard" settlement agreement and release. ADR Services, Inc., and other ADR providers, often have a standard stipulation for settlement that the parties can use to memorialize their agreement.

Zoom, Zoom: For the past two-and-one-half years, almost all MSCs and mediations were handled remotely. There is now a shift back to in-person events, but it appears that remote is the preference of many lawyers and is here to stay. The above considerations still apply to remote MSCs and mediations with, in my experience, one significant, positive difference: it is more likely that the actual decision-makers will attend a remote proceeding.

Michael G. Balmages *is a mediator, arbitrator and discovery referee with ADR Services, Inc. He has presided at more than 500 mediations and more than 1,000 MSCs as a temporary judge in the Orange County Superior Court. Mr. Balmages may be reached at mbalmages@adrservices.com; 949-863-9800.*

This article first appeared in Orange County Lawyer*, January 2023 (Vol. 65 No. 1), p. 44.* *The views expressed herein are those of the author. They do not necessarily represent the views of* Orange County Lawyer *magazine, the Orange County Bar Association, the Orange County Bar Association Charitable Fund, or their staffs, contributors, or advertisers. All legal and other issues must be independently researched.*