ALBERTSON & DAVIDSON LLP
ATTORNEYS AT LAW

What to Expect At Your Mediation or Mandatory Settlement Conference

Introduction.

It is estimated that around 98% of all civil cases (with includes both civil and trust and will matters) settle before trial. There are many factors that lead parties to settle, but one of the biggest factors is the use of mediation and mandatory settlement conferences in lawsuits. Mediations and mandatory settlement conferences (called an "MSC" for short) are informal meetings where a neutral third-party (typically a lawyer or a judge) attempts to reach a voluntary resolution between the parties. It is important for you to understand what occurs at a mediation or MSC and what you should expect as part of the settlement process.

Mediation

What is Mediation?

A mediation is a meeting between the parties, their lawyers, and a neutral third-party—called a "mediator." The meeting usually takes place at either the mediator's office or one of the lawyers' offices. Sometimes parties will attend a mediation voluntarily, with each party agreeing to participate in hopes of settling the case. But mediation can also be ordered by the Court. Even if mediation is not "ordered" by the Court, the Court often leans heavily on parties to attend at least one mediation before their trial date is set. In fact, some Court will only give priority for trial setting to parties who have attended mediation.

What Mediation is NOT.

Mediation is NOT a forum for deciding your dispute. In other words, the mediator will not make a decision or make any suggestions to the Court as to who should prevail. The mediator is merely a neutral negotiator. The mediator's job is to help the parties see the strengths of the opposing party's case and the weaknesses of your own case, and propose possible ways in which the matter could be settled before trial.

Mediation is also not a forum for justice. The mediator will not decide who is right and who is wrong. Instead, the mediator focuses on a financial solution, with the intent of reaching a

voluntary settlement between the parties. If a voluntary settlement is not reached between the parties, then the mediation ends and the lawsuit continues as before.

What Occurs At the Mediation.

Every mediator handles the process differently. But typically, a mediation is conducted at the mediator's office. The parties are placed in separate rooms and the mediator takes turns talking to each party by going from room to room.

A good mediator will listen to you or your lawyer recite the facts of your case and make the relevant legal arguments. The mediator, however, is not there to make a decision. Rather the mediator will expect one of the sides to start the process by making an offer to compromise the case. That initial offer will then be conveyed to the opposing party and a counter-offer will usually be made. This process of negotiation continues until either a settlement is reached or the mediation ends without settlement.

Confidentiality

Under California's rules of evidence, anything said by a party at mediation is strictly confidential. The mediator is under a duty not to disclose anything you say to the other side unless you specifically grant the mediator permission to do so. Even if the mediator does disclose information to either party, that information is still confidential as between the parties and cannot be used for any purpose in the case afterward.

For example, one party may admit to something during the mediation process that is disclosed, with permission, to the other side. If a settlement is not reached, that admission could NOT be used for any purpose in the case, including trial, because anything said in an attempt to compromise a case is protected. And protected information cannot be used as evidence. This rule is meant to encourage parties to initiate settlement discussions in the hope of resolving the case—and without the penalty of having something said in furtherance of a settlement used against a party at a later date.

Parties Must be Present.

It is mandatory that you appear at mediation. The process only works if each party is present during the entire mediation.

How Long Does it Take?

A medication can take anywhere from 4 to 8 hours or more to complete. Mediations are typically scheduled to last an entire day, but there are half-day mediations available. Usually, if an agreement is to be reached between parties, it does not occur until later in the day once each side has invested a good deal of time and energy at the mediation.

What Happens if An Agreement is Reached?

If the parties are able to reach a compromise, then the agreement is usually reduced to writing at the mediation by the parties' attorneys and then signed before anyone leaves. In some cases, especially Trust and Will lawsuits, the settlement agreement will need to be approved by the Court. If that occurs, then the parties would still sign the agreement before leaving, and then one of the parties would be responsible for drafting a petition to the Court seeking approval of the settlement agreement.

The settlement agreement usually includes a full release of all claims by all parties, meaning that the lawsuit is done once and for all.

What Happens if NO Agreement is Reached?

If an agreement is not reached at the mediation, then the parties continue the lawsuit just as they did before going to mediation. That means discovery (such as depositions and written discovery) continues and the case is prepared for trial in Court where the final determination will be made either by a judge or jury, depending on the type of case you have.

How Much Does it Cost and Who Pays?

Mediations vary in cost depending on who you use as a mediator. Private attorneys who offer mediation services usually are the lowest cost option at around $300 per hour, with a four-hour minimum (that's a minimum of $1,200 for the mediation session). The parties usually split the cost of the mediator equally.

If you use a mediation service, such as Judicate West, IVAMS or JAMS, they typically employ well-known and respected mediators, including retired judges, and their hourly fees are typically around $450 to $500 per hour, also with a four-hour minimum (i.e., $2,000 minimum fee). Again, this fee is usually split equally among the parties.

Finally, some Counties have low-cost mediation options, such as the Dispute Resolution Service provided by the Riverside County Bar Association, who offer different types of

mediation services at differing rate schedules depending on the type of case and whether it is a Court referral. In these types of mediations, you typically do not have a choice of mediator. Instead, the mediator is selected for you at random.

In addition to the cost of the mediator, there are the attorneys' fees in preparing the mediation brief (which gives the mediator an understanding of your side of the case), and attorneys' fees for attending the mediation.

How Many Mediations Can I do?

Most cases will only have one mediation because a majority of cases settle at the first mediation. For those cases that do not settle, parties are able to attend additional mediations if they are willing to incur the additional cost and expense of doing so—although most cases do not have more than one mediation session.

At times, cases can even settle after an unsuccessful mediation on the same, or similar, terms and conditions that were worked out at the mediation session.

Mandatory Settlement Conferences (MSC)

Most Courts in California have their own types of settlement procedures. The most common procedure is the Mandatory Settlement Conference or MSC.

Every Court handles MSCs a little differently. For example, with Trust and Will lawsuits in San Bernardino County, MSCs are conducted by the same judge assigned to the your case for trial. You appear in the judge's courtroom, usually beginning at 1:30 p.m., and the judge meets with the lawyers to discuss possible settlement options. These proposals are then discussed with the parties by their attorneys and the negotiation continues between the lawyers and the judge.

In Riverside County, however, all cases (both Trust and Will lawsuits and civil lawsuits) are assigned to an MSC with only one Judge whose sole job is to attempt to settle cases. The parties meet in the Court hallway, with the lawyers accompanying them, and the Judge goes between the parties trying to negotiate a settlement. If a settlement is reached, the parties write down the terms on a pre-printed form and all parties sign. If a settlement is not reached, then the lawsuit continues as before.

How is An MSC Different from a Mediation?

An MSC differs from a mediation in that MSCs are usually conducted by a judge—sometimes the same judge hearing your case. MSCs usually take place at the courthouse and the

parties do not have to pay a mediator's fee. However, MSCs are much shorter in time than a mediation and, for that reason, they tend not to result in settlements as often.

Like a mediation, an MSC is a voluntary settlement process, so the case will only settle if both parties agree to a compromise. The judge in an MSC setting will NOT make a forced or binding decision about your case. The judge is only there in an attempt to broker a compromise. If no compromise is reached, then the case must continue to be prepared for trial. Trial is the only part of the process where a binding decision will be made for you regarding the outcome of your case.

Parties Must be Present.

It is mandatory that you appear at an MSC. The process only works if each party is present during the entire MSC.

How Many MSCs Can I Expect?

Typically, the Court will only require a single MSC session. If it is not successful, than no further MSCs would be scheduled unless the parties requested it. This very rarely happens.

What's The Difference Between Mediation and Arbitration?

Unlike mediation, which is an informal settlement discussion that takes place with a neutral third-party, an arbitration is a more formal procedure to resolve a case. Arbitration is like a mini-trial that uses some, but not all, of the rules of evidence typically used in Court. An arbitration is presided over by anywhere from one to three arbitrators (usually lawyers or retired judges) who hear evidence on the case and then make a forced decision. In a majority of cases, an arbitrator's decision is binding and must be followed by the parties. This is a forced decision of the case rather than a voluntary compromise between the parties. There can be non-binding arbitration, where the arbitrator's decision is subject to review by the Court, but that is a less common procedure.

In binding arbitration, the decision is protected from any further Court review, there is virtually no grounds on which to appeal an arbitrator's decision (as opposed to a Court trial where the appeal rules are a bit more liberal). And arbitrations usually allow far less discovery of facts and relevant evidence. Parties usually only attend arbitration if they have agreed to that procedure in advance, such as in a written contract. Rarely do parties voluntarily agree to move their cases from Court to an arbitration process because arbitration is far less liberal with discovering evidence and deciding facts of the case.

Some of the more common contracts that include arbitration provisions are business contracts, standard residential real estate contracts (including listing agreements), title insurance policies, and other types of insurance policies, health insurance policies, and some employment agreements. In these instances, the arbitration process is the only method by which a dispute can be decided and any lawsuit filed in Court is subject to removal to arbitration upon motion filed by any one of the parties.

Need More Information?

This is a brief overview of the mediation and mandatory settlement conference procedures you will encounter in your lawsuit. We will keep you informed regarding any mediation or MSC scheduled in your case throughout the process. If you ever have any questions or would like more information regarding your case, feel free to contact us:

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