



Settle up

Getting the most out of a Mandatory Settlement Conference



Cooper

BY MILES B. COOPER

The lawyer walked down the Frank Lloyd Wright-designed hallway in the court section of a county building so unique it was used for a science fiction movie years ago. The client sat waiting on a bench, while other attorneys milled about waiting for courtrooms to open. The lawyer nodded a hello to those the lawyer knew, and then sat down with the client. The client seemed eager for the day's Mandatory Settlement

Conference. Justice favors the prepared, and they were ready for the day's twists and turns.

Read the rules

Mandatory settlement conferences run the gamut from amazing to slow slogs. The MSC's timing in a case's arc can make it very useful. It can be the final added pressure necessary to close the gap a diligent mediator has already narrowed. One who prepares, wins. Review the local rules. They contain specific requirements about what must be in the MSC brief and who needs to attend. Submit the brief as far in advance as possible. This allows the other side to communicate it to the decision makers and assign appropriate authority. If expert depositions or other critical information develops in the interim, consider a supplemental brief.

Prepare the client

Reviewing the rules will also help one prepare the client. Will the MSC be handled by a judge? A two-attorney panel? The MSC may be the first time the client visits the courthouse. While this is written in the COVID Zoom era, we expect to transition back to in-person MSCs at some point. The courthouse visit is a wonderful opportunity to help a client work through pre-trial jitters.

Make a plan for exactly where to meet the client. Exchange mobile numbers. The map is not the terrain. And what seemed like a simple meeting location the day before sometimes isn't. If the client seems particularly nervous, offer to meet nearby, and go in together. Tell the client what to expect. For example, knowing in advance that lawyers typically discuss matters in chambers without clients removes that surprise at the MSC.

Eyes and ears

Attending the MSC may be the main event, but the courthouse visit affords one a pre-trial courthouse temperature check. As one walks the halls, ask questions, chat with court staff and security. Are cases getting out? Are juries being called in live or reviewing evidence from home? What judges are hearing civil cases? For those who might be C.C.P. § 170.6 challenges, are they in long-cause trials perchance? If the matter is directly assigned, one can discuss exhibit preferences and other department-

specific peccadillos with the courtroom clerk. While some feel MSCs can be wastes of time, the intelligence-gathering alone makes it worth the trip.

Are we negotiating?

Given how close an MSC is to trial, one may have sent out a C.C.P. § 998 Formal Offer to Compromise with the idea that it will be the number the case will be tried against. Invariably, the judge will bring tremendous pressure to bear on a side that tries to hold that line. "As part of my role as MSC judge, I make a report to the Presiding Judge and that can have a significant impact on whether your case finds a judge at trial call," was a not-so-veiled threat sometimes deployed by a certain judge when that judge felt a party was not negotiating in good faith. The robe's power is not always ominous, however. That same power, with a looming trial date, can work magic.

Use the process to one's advantage. Do not be afraid to hold one's center. We've been told many times variants of "Jurors in this county don't award that kind of money," only to find that the past is not always prologue.

On the record and communicated

If one reaches a settlement, the court will usually provide an opportunity to put the settlement on the record. Take advantage of this, making sure the adjuster is on the record and acknowledges having the authority to bind the settlement under C.C.P. § 664.6. There's nothing worse than reaching a settlement only to find oneself in a fight over unexpected settlement terms a few days later.

In the post-settlement excitement, remember to alert the rest of the trial team that the case resolved. Silly as it may sound, this patently obvious step frequently gets overlooked. Those back at the ranch want to know! At the same time, advising experts that the matter has resolved helps stem the pre-trial expert cost hemorrhage.

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Back to our lawyer and client. By the end of the day, they stood in a courtroom with the judge on the dais and a court reporter in position. "I'm pleased to hear you were able to reach a settlement," the judge began, "Who would like to recite the terms for the record?"

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