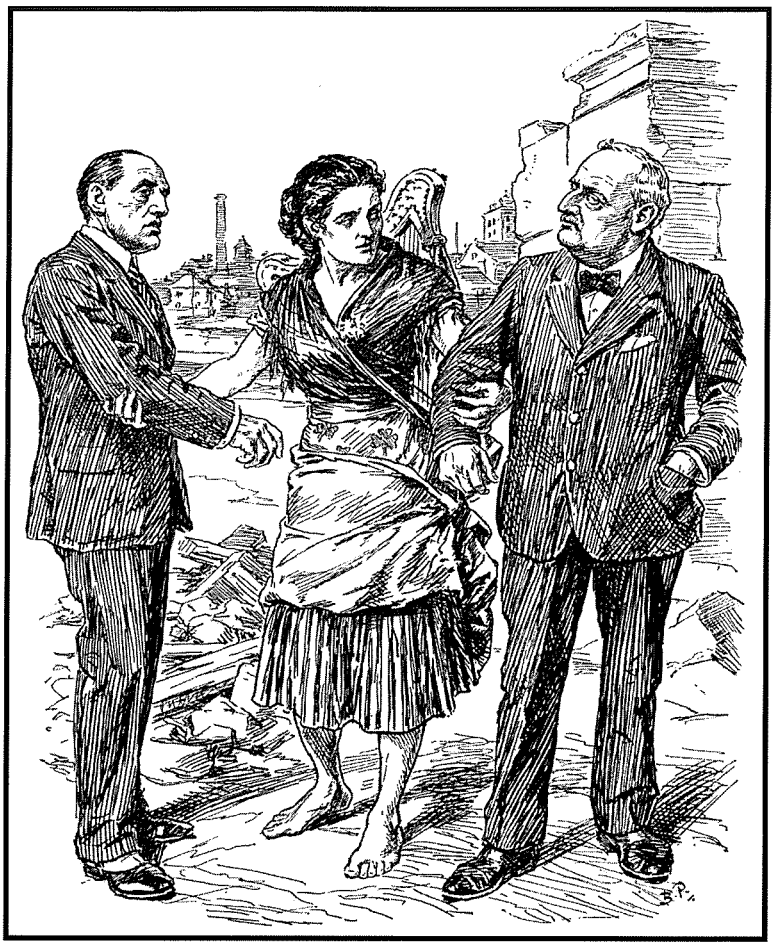
"Mediation" vs. "Settlement Conference"



The Need For Judicial Clarification

By Edith R. Matthai and Steven S. Fleischman

Ask 10 experienced litigators the difference between a "mediation" and a "settlement conference" and you are likely to get 12 answers. The confusion in the area is not surprising since California appellate courts have repeatedly, expressly refused to define the difference between "mediations" and "settlement conferences." In many instances, the differences between a "mediation" and a "settlement conference" are academic only, particularly when the presiding officer is a sitting judge. But there is an important statutory distinction: the Evidence Code creates broad confidentiality for "mediations" covering anything that was said or done and further prohibits a "mediator" from communicating with the Court, absent consent of the parties. (Evid. Code § 1121.) In contrast, "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 section 1152. There is not the same statutory shroud of secrecy for "settlement conferences" that there is for "mediations." This distinction can create confusion and a trap for the unwary litigator, particularly when the term "mediation" is used to describe what is actually a "settlement conference."

California statutes and the California Rules of Court refer separately to "mediations" and "settlement conferences." (*See* Evid. Code § 1117(b)(2); Family Code §§ 20038(h), 66034; Ins. Code §§ 10089.80, 10089.82; Cal. Rules Ct., rules 3.800(c), 3.851, 3.1380.) The most important statutory distinction between "mediations" and "settlement conferences" is found in Evidence Code section 1117(b)(2), which expressly provides that Chapter Two of Division Nine of the Evidence Code, addressing mediations and mediation confidentiality, does *not* apply to "settlement conferences":

(b) *This chapter does not apply to* either of the following:

(1) A proceeding under Part 1 (commencing with Section 1800) of Division 5 of the Family Code or Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

(2) *A settlement conference pursuant to Rule 222 of the California Rules of Court.*

(Evid Code § 1117(b), italics added.)

Thus, "the confidentiality provided by [Evidence Code] section 1119 . . . [does] not apply to . . . a mandatory settlement conference (Cal. Rules of Court, rule 222)." (*Rinaker v. Superior Court* (1998) 62 Cal.App.4th 155, 164 fn.3.) Another court has held that the "Evidence Code provisions, including those addressing confidentiality, are applicable to all mediation proceedings, except for court-supervised settlement conferences (under Cal. Rules of Court, rule 222). . . ." (*Stewart v. Preston Pipeline, Inc.* (2005) 134 Cal.App.4th 1565, 1572.)

"Settlement conferences" are governed by Rule 3.1380 of the California Rules of Court, which provides in paragraph (a) that "On the Court's own motion or at the request of any party, the Court may set a mandatory settlement conference." (Cal. Rules of Ct., rule 3.1380(a).)

One of the few cases discussing the characteristics of a "settlement conference" is the 1987 decision of *Raygoza v. Betteravia Farms* (1987) 193 Cal. App.3d 1592. In *Raygoza*, the parties agreed to have a "voluntary settlement conference . . . before a retired judge, whose fees for such services were to be shared equally by the parties." (*Id.* at p. 1594.) One party refused to participate, which led to the trial court awarding sanctions under [former] Rule 227 of the California Rules of Court; at the time, that rule authorized the imposition of sanctions for the failure to participate in any conference ordered by a court. The Court of Appeal reversed the imposition of sanctions, holding that what the parties had agreed to was not a "settlement conference," because it was voluntary and was not supervised by the Court using Court facilities:

If a voluntary settlement conference is held by the parties *which is not required by the rules or by a court order*, the court has no authority to make an order of reimbursement or payment to the county pursuant to rule 227.

Rule 222 provides for mandatory settlement conferences and authorizes other or additional conferences upon request of all parties or by order of court. . . .

We construe rule 222 to pertain only to mandatory or voluntary settlement conferences supervised by the court. It does not apply to a voluntary settlement conference before a private person arranged by the parties without request of or notice to the court, which was not on the court calendar and where the parties were not required to and did not file settlement conference statements and was held without use of the court's facilities and at no cost to the county.

(*Id.* at pp. 1595-1596, italics added.) The court went on to hold that the imposition of sanctions could not be justified under the contempt powers of the court because the "voluntary settlement conference did not involve any court proceeding or process." (*Id.* at p. 1596.)

Thus, the *Raygoza* court identified "settlement conferences" as having the following characteristics:

a. being "mandatory" or "supervised by the court;"
b. conducted by a judicial officer, rather than a private party;
c. being placed on the court's calendar, as opposed to being arranged before a private party;
d. conducted using the court's facilities; and
e. no cost to the parties.

Mediation is defined in Rule 3.852(1) of the California Rules of Court, which was adopted January 1, 2003, as "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." (Cal. Rules Ct., rule 3.852(1).)

Courts have declined to articulate the differences between a "mediation" and a "settlement conference." In *Foxgate Homeowners' Association v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, the California Supreme

Court expressly declined a request made by two *amici curiae*, including the ASCDC, to clarify the differences between "mediations" and "settlement conferences." The court did so because it was "clear" that the proceeding at issue was a mediation. (*Id.* at p. 12, fn.8.) In *Foxgate*, the superior court appointed a retired judge to serve as mediator and special master; the Court's order specifically provided that the mediation privilege applied. (*Id.* at pp. 4-5.) Thus, applying the *Raygoza* criteria, it is easy to see how the Supreme Court concluded that a "mediation" was involved: it was before a retired judge, not a sitting judge, presumably not using court facilities and was for a fee.

Three years later in *Rojas v. Superior Court* (2004) 33 Cal.4th 407, the California Supreme Court again declined an invitation by an *amicus curiae* to delineate the distinctions between a "mediation" and a "settlement conference" because the issue was not raised by any of the parties and all of the parties "assumed that a mediation took place in the underlying action." (*Id.* at p. 417, fn.4.)

In *Doe 1 v. Superior Court* (2005) 132 Cal.App.4th 1160, the Court (Division Eight of the Second Appellate District) declined to address the distinction because the issue was raised for the first time at oral argument. The Court noted the "conceptual difficulties in distinguishing between a mediation and a settlement conference when a bench officer is presiding at those talks." However, the Court declined to address the issue, instead concluding that a mediation took place because the orders at issue referred to "mediation" and nowhere did the Court order refer to [former] Rule 222 of the California Rules of Court. (*Id.* at p. 1166.) Recognizing the uncertainty in the law, the Court provided guidance for parties in the future: if the parties do not intend to be bound by the mediation confidentiality provisions, then they should "make clear at the outset that something other than a mediation is intended." (*Id.* at pp. 1166-1167.) Because the Court concluded that the parties engaged in a mediation, the Court held that documents prepared for in anticipation of the mediation were privileged under Evidence Code section 1122. (*Id.* at pp. 1168-1170.) Arguably, the outcome would have been different if a "settlement conference" had been involved.

Similarly, in *Travelers Casualty & Surety Co. v. Superior Court* (2005) 126 Cal.App.4th 1131, the same court (Second Appellate District, Division Eight) expressly declined to clarify the differences between a "mediation" and a "settlement conference." (*Id.* at p. 1139 fn.8, citing *Foxgate, supra.*) The Court did so because the "parties have never contended that the Valuation Hearing was something other than a mediation, even though the mediation took place as part of a voluntary settlement process." (*Ibid.*) Thus, the Court cautioned that its decision should not be "construed as holding that all voluntary settlement conference are mediations which are subject to the rules concerning the conduct of mediation proceedings." (*Ibid.*) Because the Court held that a "mediation" was at issue, the Court held that certain proceedings engaged in by the trial court violated the provisions of the Evidence Code regarding mediation confidentiality.

Both *Doe I* and *Travelers Casualty* involved settlement proceedings which under *Raygoza* were arguably "settlement conferences" and not "mediations." In both cases, the settlement proceedings were conducted by a sitting superior court judge, using court facilities that were free of charge to the parties. Yet, in both cases the appellate court held that they were "mediations" and, thus, subject to mediation confidentiality under the Evidence Code not because of the substance of the settlement procedure used, but only because of the *terminology* the parties and the Court used.

Another variation on this issue was involved in a recent decision decided by Division Three of the Fourth Appellate District on May 31, 2006 in *Lindsay v. Lewandowski* (2006) 139 Cal. App.4th 1618. In *Lindsay* the parties participated in a mediation before a retired judge that resulted in a written stipulated settlement agreement. The written settlement agreement called for "binding mediation" in the event of a dispute between the parties. A dispute arose and one party moved for judgment based on the stipulated settlement under Code of Civil Procedure section 664.6. The retired judge submitted a declaration in which he explained what was meant by the phrase "binding mediation:" if the parties were unable to come to an agreement, each party would make arguments and submit final offers to the judge, who would select one offer or the other. In essence, if the mediation was not successful, the "mediator" became an "arbitrator" who would issue a final, binding ruling. Arbitration was compelled, the retired judge rendered a decision, the arbitration award was confirmed in superior court and the losing party appealed.

The Court of Appeal held that the stipulated settlement agreement was uneforceable because of the uncertainty of the phrase "binding mediation." In the parties' agreement, "binding arbitration" was replaced with "binding mediation." Thus, the Court held that the parties clearly did not agree to "binding arbitration." Yet, that is precisely what "binding mediation," as applied by the lower court and the retired judge, became: the "mediator" became an "arbitrator" and made an *adjudication*, rather than assisting the parties in reaching a *voluntary* settlement, the *sine quo non* of mediation.

The Court of Appeal also noted the hazzards involved in recognizing "binding mediation:" would the arbitration rules, the court-ordered mediation rules, the mediation confidentiality rules or some mix of rules apply.

In his concurring opinion, Justice Sills criticized what he thought was the use of "Madison Avenue and MBA types" taking over "what we once called private judging" and the improper use of "softer" terms to describe settlement conferences ("mediations") and arbitrations ("binding mediation"). Yet, even Justice Sills referred to a "settlement conference as the old fashioned term for mediation," even though as discussed herein there are important differences.

The upshot is that attorneys must be precise in the language and terminology they use in describing any settlement procedure, because the differences in procedure can affect the enforcability of the result. The authors of this article believe that the criteria laid out in *Raygoza* provide a good distinction between "settlement conferences" and "mediations:" settlement conferences are conducted by sitting judges, using court facilities without charge to the parties. "Mediations" are conducted by retired judges or private persons, using private facilities, for a fee. But what these authors think is irrelevant: judicial clarification is needed on this issue.

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