

ADR Services, Inc. & the Sacramento County Law Library Present:



# setting up for success

Laying the Groundwork for Resolution in Mediation

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August 3, 2023



# speakers



steve block



geri green

# agenda

**1**

Inevitability of ADR

**2**

Setting Up The Case, Client and You up for Successful Mediation

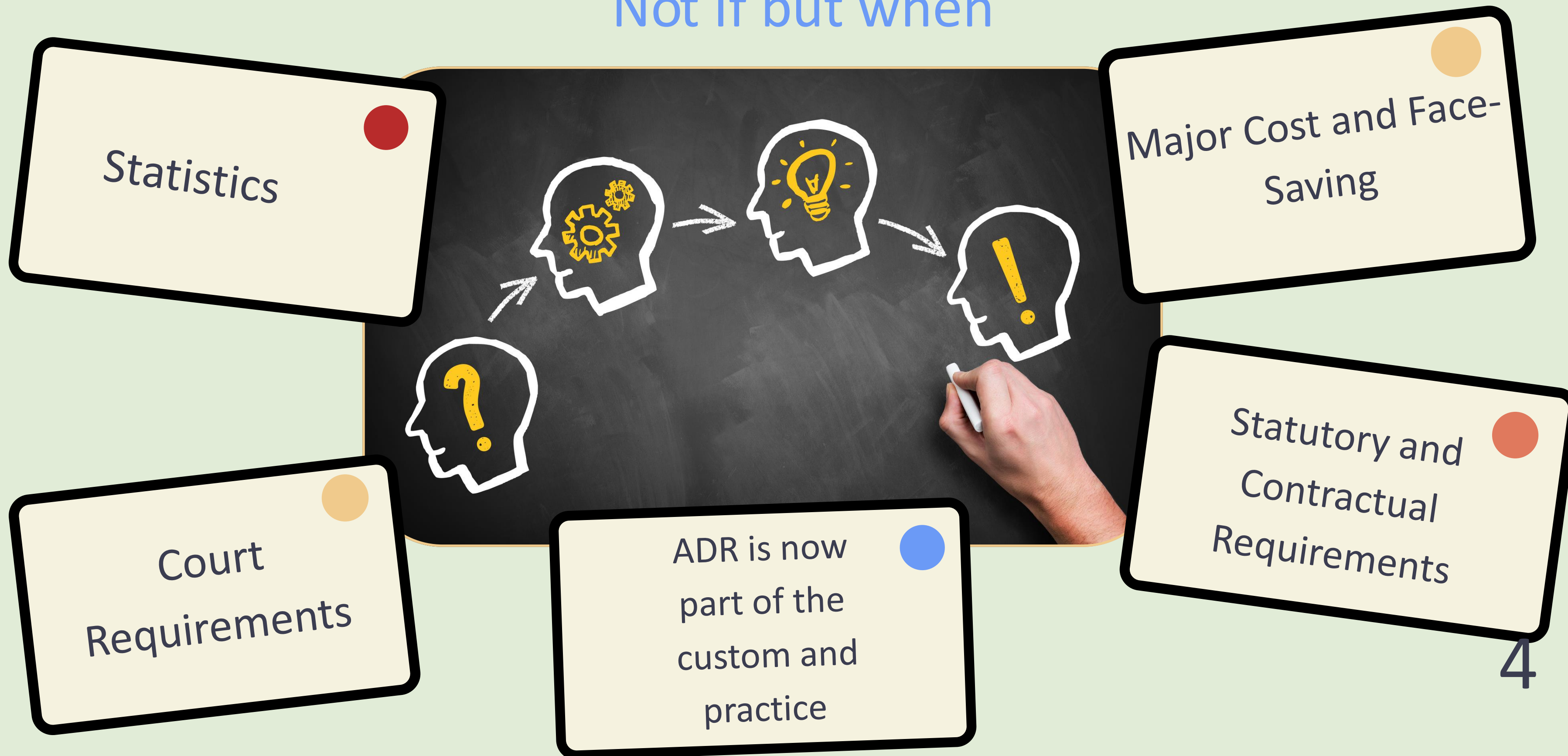
**3**

The Timing & The Process

**4**

Logistics & Best Practices

Recognizing the inevitability of  
resolution through ADR  
**Not If but when**





# Examples of Local Superior Court ADR Requirements

## Courts – Civil Actions



### Alameda

“strongly encourages” ADR before trial. Rule 3.700. If the court finds that it is in the best interests of all parties, the court may refer cases to alternatives to traditional litigation, such as arbitration, mediation, neutral evaluation, and voluntary settlement conferences before they are set for trial.

### San Francisco

Mandatory settlement conferences are ordered by the court close to trial, unless requested earlier; Mandatory Judicial Arbitration pursuant to CCP1141.11 for all actions in which the amount in controversy is less than \$50,000. Local Rule 4.1 allows for mediation in lieu of judicial arbitration, so long as the parties file a stipulation to mediate after being assigned to judicial arbitration.

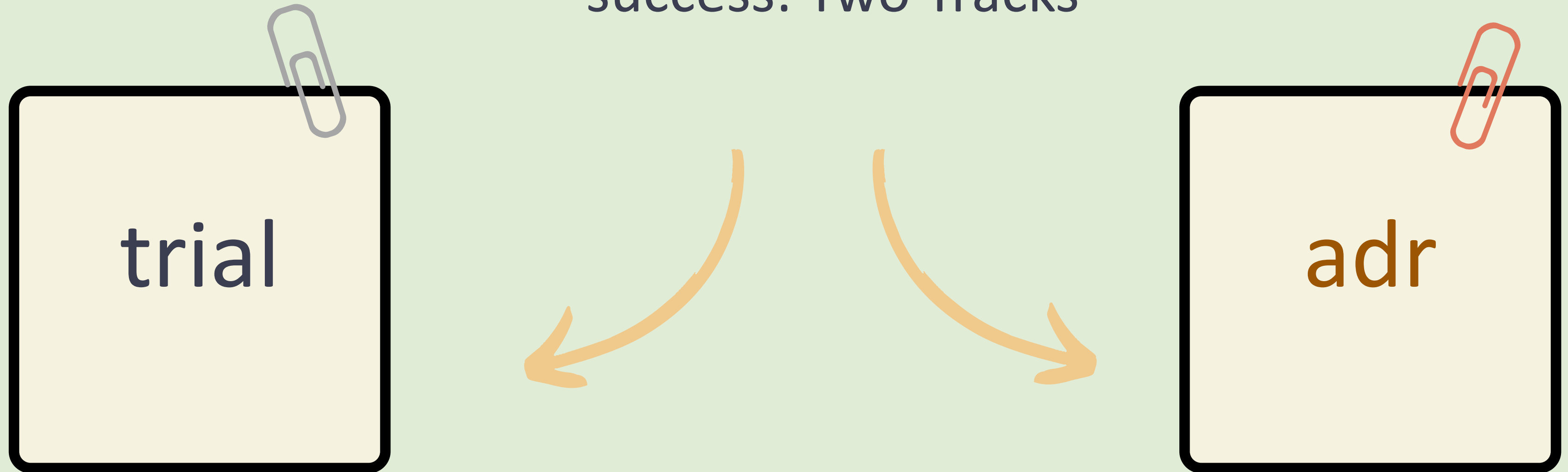
### Sacramento

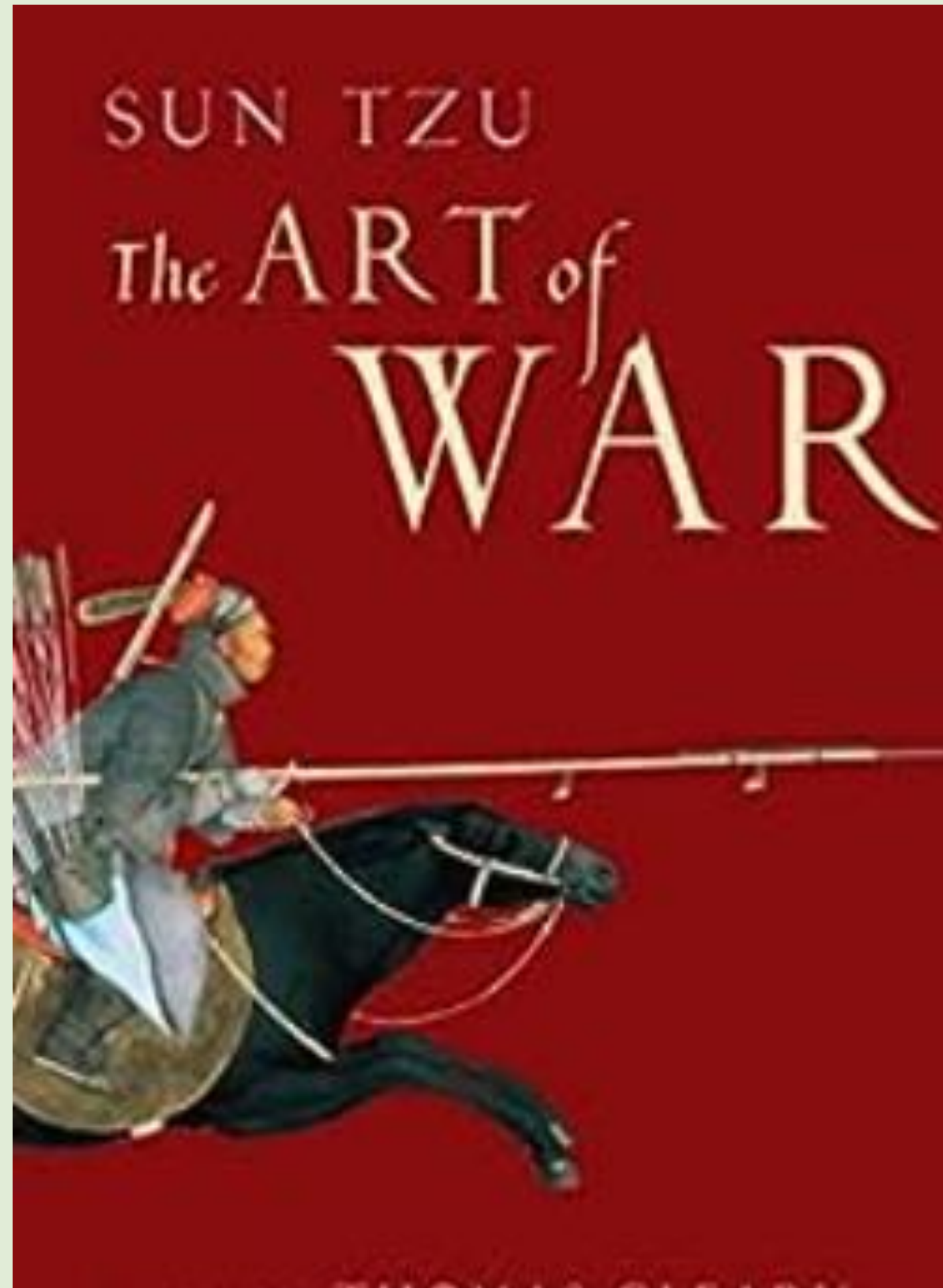
Strongly encourages ADR. Counsel must serve ADR information packet with the complaint. (Cal RC 3.221). Default is judicial arbitration and MSC's. <https://www.saccourt.ca.gov/civil/alternative-dispute-resolution.aspx>

### Contra Costa

Settlement Mentors are often assigned shortly before trial. In an attempt to avoid protracted, costly and unnecessary discovery disputes, many departments are requiring parties to participate in the Discovery Facilitator Program prior to filing a motion (L.R. , Rule 3.300.)

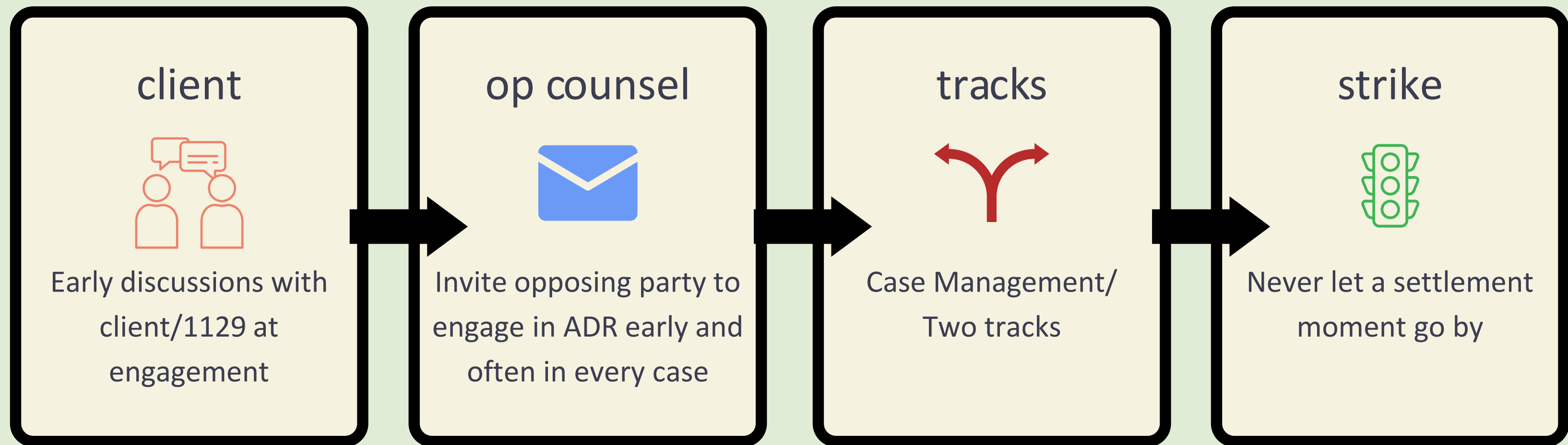
## Setting up your Case for success: Two Tracks





# Planning Ahead to get The Case Mediated

## When it is in The Sweet Spot





# Raising the topic of mediation without looking weak with clients and opposing counsel.



- At the beginning: Evid. Code § 1129 can help.
- Considerations: Timing, impediments, needed discovery, etc...
- Streamline these issues for both sides.
- Mutually set goals.
- Mediator Selection: ask if they have any mediators who they think are effective and offer to exchange the names of mediators who you think are effective.
- Choose the right words: Vocabulary is important—demand mediation, inviting, triggering, insinuating



## Cost and Reality of Discovery

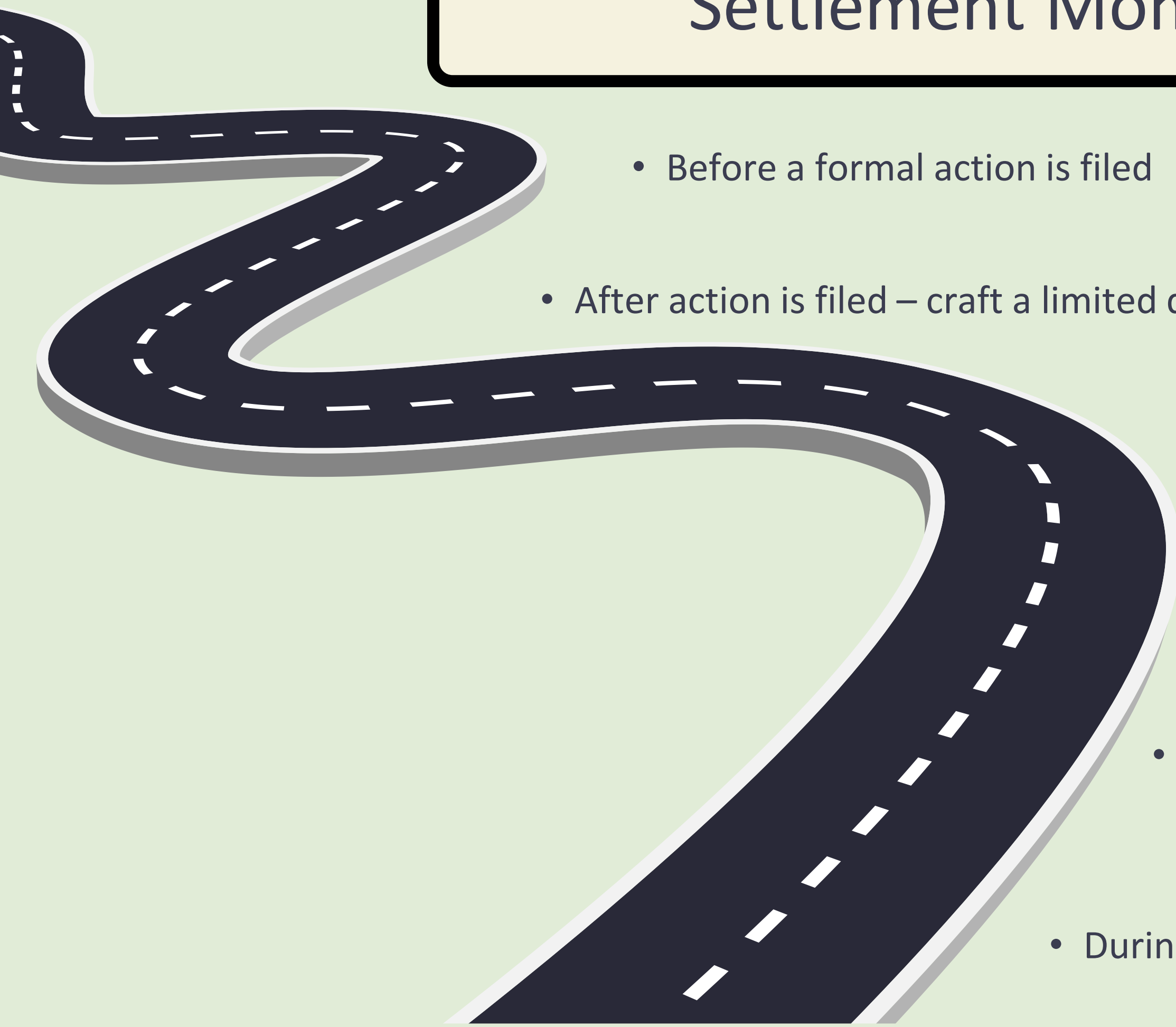
### Pareto's Principle



# Identifying The Sweet Spot




# Settlement Moments


- 
- A dark blue, winding road with white dashed lines runs from the top left towards the bottom right of the slide. The road has a 3D effect with a light blue shadow on its left side.
- Before a formal action is filed
  - After action is filed – craft a limited discovery plan/ADR
  - After Preliminary Discovery  
(before spending real money/depo/experts)
  - Around a significant ruling
  - Shortly before Trial (MSC – complexity - need expertise – best help-expense – fire power)
  - During Trial – Post Judgement - Appeal

# A Note On Dispositive motions, pre-trial, trial & beyond



- 
- A grey paperclip icon is attached to the top left corner of the left-hand note card.
- May Narrow or broaden scope of the case for trial
  - Better understand risks/rewards
  - Save cost of trial
  - Have knowledge of liens and experts
  - Control outcome
  - Client satisfaction



- 
- A red paperclip icon is attached to the top right corner of the right-hand note card.
- Most of the benefits of Early Mediation have diminished



# Structure: Considerations for Mediation?

Mediator Selection: In  
Person/Zoom/Hybrid?  
Locations?

Who's coming? Necessary  
Parties? Carriers? Lien  
Holders? Support?

What do we tell the  
mediator & What do we  
share with Opp Party?

Preparation

1. Client (Remote?; On camera?; Interpreter?)
2. Briefing and Brief sharing (is it different if virtual?)
3. Liens & Damage Assessments (Howell?)

Discovery – is there  
something you need for  
resolution?

Impediments to Settlement

14

# Location

Zoom



In Person



Hybrid



# Selection Is Critical

**Choice**

**Choice**

Language/bi-lingual  
mediator

Subject Matter Expertise

Do we need a robe?

Benefit of having opposing  
counsel suggest the list first

Styles: Evaluative/Facilitative/  
Directive

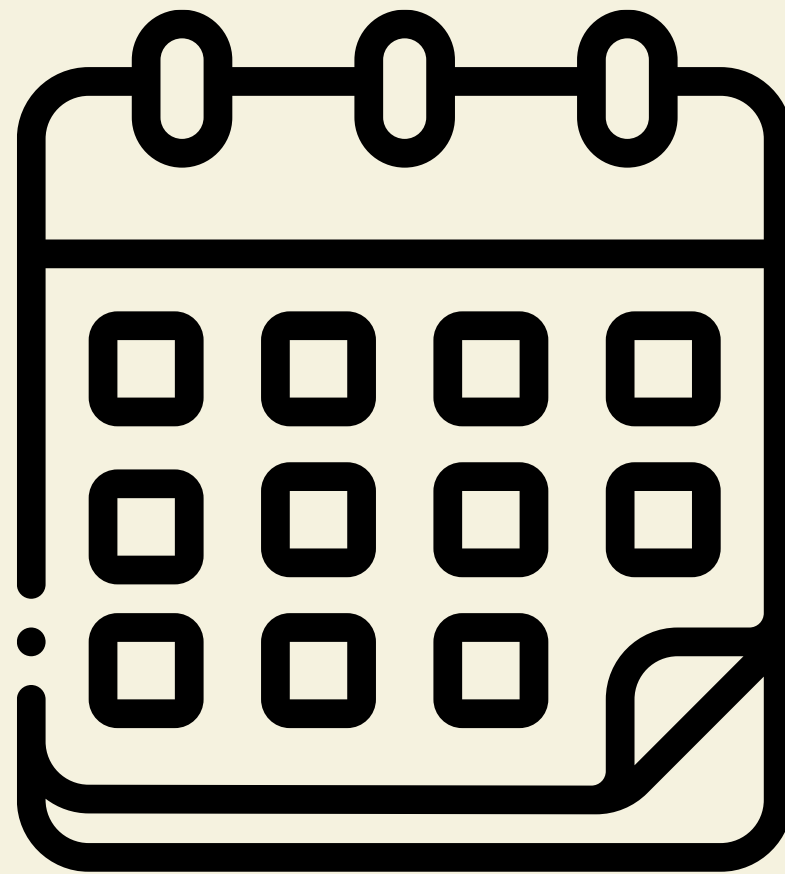
Difficult Opposing Counsel

Emotional Intelligence

Gender, culture, race

Mediators will refer

# Scheduling



Half-day

Full day

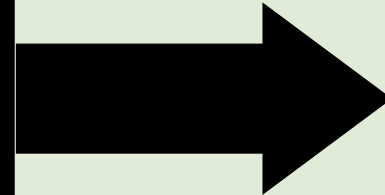
multiple days

# Tips on mediation briefs



## Content

- Procedural status, and history of negotiations
- Roadblocks to settlement
- Keep your brief short, central facts, law and damages
- Detail dispositive legal issues
- Identify who the decision-makers are.
- Identify any issues requiring more facts to seriously consider



## Submission

- Starts your effort to educate the mediator
- Consider your audience: opposing counsel, the clients, the insurance claims representative.
- Avoid filing a confidential mediation brief-disruptive and causes suspicion
- Consider a confidential supplement with critical information



# Impediments to settlement

- Briefly elaborate on what you want to discuss.

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# Manage expectations

Humans have been negotiating disputes for hundreds of thousands of years.



Use your mediator as a first impression - see how your case lands. Use their feedback to your advantage.

Methods Are Often Dictated By Culture, Gender, Community, Feelings, Proven Strategies, ...  
There Is No One Way

*It is a dance*

# Access to ADR for Modest Means & Pro Per Litigants



Court

Discovery Facilitators; ENE, MSC, IDC, Judicial Settlement Conferences, Judicial Arb, and Court-ordered mediation

Bar Associations

Discounted rates

Private

Special Masters, Discovery Referees, Early Neutral Evaluators, Mediators, Judicial Referees

CMC

Community Mediation Centers: SEEDS, Community Boards, PCRC

Limited

Limited Scope Representation – for preparation and/or representation at Mediation.

# Questions?



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§ 1129. Confidentiality restrictions; client disclosure and acknowledgment requirements; requirements for printed disclosure; form; effect of noncompliance

Effective: January 1, 2019

(a) Except in the case of a class or representative action, an attorney representing a client participating in a mediation or a mediation consultation shall, as soon as reasonably possible before the client agrees to participate in the mediation or mediation consultation, [provide that](#) client with a printed disclosure containing the confidentiality restrictions described in [Section 1119](#) and obtain a printed acknowledgment signed by that client stating that he or she has read and understands the confidentiality restrictions.

(b) An attorney who is retained after an individual agrees to participate in the mediation or mediation consultation shall, as soon as reasonably possible after being retained, comply with the printed disclosure and acknowledgment requirements described in subdivision (a).

(c) The printed disclosure required by subdivision (a) shall:

(1) Be printed in the preferred language of the client in at least 12-point font.

(2) Be printed on a single page that is not attached to any other document provided to the client.

(3) Include the names of the attorney and the client and be signed and dated by the attorney and the client.

(d) If the requirements in subdivision (c) are met, the following disclosure shall be deemed to comply with the requirements of subdivision (a):

### Mediation Disclosure Notification and Acknowledgment

To promote communication in mediation, California law generally makes mediation a confidential process. California's mediation confidentiality laws are laid out in Sections 703.5 and 1115 to 1129, inclusive, of the Evidence Code. Those laws establish the confidentiality of mediation and limit the disclosure, admissibility, and a court's consideration of communications, writings, and conduct in connection with a mediation. In general, those laws mean the following:

- All communications, negotiations, or settlement offers in the course of a mediation must remain confidential.
- Statements made and writings prepared in connection with a mediation are not admissible or subject to discovery or compelled disclosure in noncriminal proceedings.
- A mediator's report, opinion, recommendation, or finding about what occurred in a mediation may not be submitted to or considered by a court or another adjudicative body.



☐Alternative Dispute Resolution

☐ADR Information Package

☐What Are My Options?

Quick links to most commonly accessed information are available immediately below:

[Arbitrator Panel List \(docs/arbitrator-panel-active.pdf\)](#)

[Arbitration Forms \(../forms/forms.aspx#civil\)](#)

[Mediation Panel List \(docs/mediation-panel-list.pdf\)](#)

[Mediation Forms \(../forms/forms.aspx#civil\)](#)

## Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) is the general term applied to a wide variety of dispute resolution processes which are alternatives to lawsuits. Types of ADR processes include: arbitration, mediation, settlement conferences, private judging, neutral evaluation, mini-trials, negotiation and/or hybrids of these processes.

Recognizing that many civil disputes can be resolved without the time and expense of traditional civil litigation, the Superior Court of California, County of Sacramento (Sacramento County Superior Court), strongly encourages parties in civil cases

to explore and pursue the use of Alternative Dispute Resolution. All ADR processes offer a partial or complete alternative to traditional court litigation for resolving disputes. At the present time, the Sacramento County Superior Court offers

Mediation and Arbitration.

### Arbitration

An Arbitrator hears evidence presented by the parties, makes legal rulings, determines facts and makes an Arbitration award. Arbitration awards may be entered as judgments in accordance with the agreement of the parties or where there is no agreement, in accordance with California statutes. Arbitration can be binding if the parties so agree in writing. If there is no such agreement, either party can reject the Arbitration award and request a trial.

### Mediation

☐Mediation is a voluntary, informal, and confidential process in which the Mediator - a neutral third party - facilitates settlement negotiations. The Mediator improves communication between the parties, assists in clarifying facts, identifying legal issues, explores options to arrive at a mutually acceptable resolution of the dispute.

What are the advantages of using ADR?

ADR can have a number of advantages over traditional court litigation.

- ADR can save time. Even in a complex case, a dispute can be resolved through ADR in a matter of months or weeks while a lawsuit can take years.

ADR can save money. By producing earlier settlements, ADR can save parties and courts money that might otherwise be spent on litigation costs (attorney's fees and court expenses.)

- ADR provides more participation. Parties have more opportunity with ADR to express their own interests and concerns, while litigation focuses exclusively on the parties' legal rights and responsibilities.

ADR provides more control and flexibility. Parties can choose the ADR process most appropriate for their particular situation and that will best serve their particular needs.

- ADR can reduce stress and provide greater satisfaction. ADR encourages cooperation and communication, while discouraging the adversarial atmosphere found in litigation. Surveys of disputants who have gone through

ADR have found that satisfaction with ADR is generally high, especially among those with extensive ADR experience.

ATTORNEY OR PARTY WITHOUT ATTORNEY (NAME, STATE BAR # AND ADDRESS):  TELEPHONE NO. FAX NO. (Optional) EMAIL ADDRESS (Optional) ATTORNEY FOR (NAME): Superior Court of California, County of Sacramento 720 Ninth Street, Room 101 Sacramento, CA 95814-1380 (916) 874-5522—Website www.saccourt.ca.gov PLAINTIFF/PETITIONER:	FOR COURT USE ONLY
DATE: DEFENDANT/RESPONDENT:	CASE MANAGEMENT CONFERENCE
CASE NUMBER: STIPULATION AND ORDER TO MEDIATION – UNLIMITED CIVIL	
ASSIGNED DEPT.:  The parties and their attorneys stipulate that the claims in this action shall be submitted to the following mediation process: <u>Type of Mediation (select one):</u>  <input type="checkbox"/> 1. Court Mediation Mediators on the court's approved ADR Panel List have agreed to provide up to three (3) hours of pro-bono Mediation. In the event the Mediation extends beyond 3 hours and parties determine it would be beneficial to continue the Mediation process: the parties will independently be responsible for compensating the Mediator in an amount as set by the Mediator.  <input type="checkbox"/> 2. Court Mediation in lieu of previously ordered Arbitration. Mediator's on the court's approved ADR Panel List have agreed to provide up to three (3) hours of pro-bono Mediation. In the event the Mediation extends beyond 3 hours and parties determine it would be beneficial to continue the Mediation process: the parties will independently be responsible for compensating the Mediator in an amount as set by the Mediator.  <input type="checkbox"/> 3. Private Mediation. Per Local Rule 2.84 the cost of mediation must be borne by the parties equally unless the parties agree otherwise. Parties will be charged an amount as set by the Mediator.  <input type="checkbox"/> 4. Private Mediation in lieu of previously ordered Arbitration. Per Local Rule 2.84 the cost of mediation must be borne by the parties equally unless the parties agree otherwise. Parties will be charged an amount as set by the Mediator.	

Neutral

Court Neutral Selected: Name (If type of Mediation selected above is option 1 or 2)	_____
Alternate Court Neutral Selected: Name (If type of Mediation selected above is option 1 or 2)	_____
Alternate Court Neutral Selected: Name (If type of Mediation selected above is option 1 or 2)	_____
Private Neutral Selected: Name  (If type of Mediation selected above is option 3 or 4)	_____

Other Stipulations

☐ Discovery to remain open 30 days prior to trial.

Additional Stipulations: \_\_\_\_\_