Mediation Appearance – Comply Fully or Foot the Full Bill

By Blane G. McCarthy

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This should be a no-brainer. After all, it's in every Mediation Order and is the subject of a specific Florida Rule of Civil Procedure. Now, there is unequivocal case law authority.

What constitutes "appearance" at mediation and the appropriate sanctions for failure thereof are discussed in Rule 1.720(b).

> "If a party fails to appear at a duly noticed mediation conference without good cause, the court upon motion shall impose sanctions, including an award of mediator and attorney's fees and other costs, against the party failing to appear. … Otherwise, unless stipulated by the parties or changed by order of the court, a party is deemed to appear at a mediation conference if the following persons are physically present:
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> (1) The party or its representative having full authority to settle without further consultation.
> (2) The party's counsel of record, if any.
> (3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation."

Despite the clarity of this Rule, litigants pushed the envelope. The court in Carbino v. Ward, 801 So. 2d 1028 (Fla. 5th DCA 2001) reiterated the disjunctive nature of the above list, confirming that one person cannot fill more than one classification. It upheld sanctions imposed by the trial court when a claims adjuster appeared "on behalf" of the insured party.

Nevertheless, many trial courts were denying sanctions by qualifying Carbino. Immediately upon learning of the Defendant's absence, the Plaintiff in Carbino aborted the mediation conference. Based on this factual posture and despite Rule 1.720(b), courts were interpreting Carbino to be predicated on such response. Parties who proceeded with the mediation conference were frequently held to have waived their rights to sanctions for the opposition's failure to appear.

This waiver theory was recently nullified in Sequi v. Margrill, 844 So. 2d 820 (Fla. 5th DCA 2003). When opposing counsel appeared "on behalf" of his client, Sequi decided to proceed with the scheduled mediation. After it proved unsuccessful, he moved for sanctions. Finding no discretion within Rule 1.720(b), the court awarded mediator and attorneys' fees.

As a Mediator, I agree with the Sequi statement that "a party's actual presence at mediation is often critical to its success." More fundamental is the fact that such is absolutely required. The law now unequivocally provides the appearing party with a free bite at the mediation apple should he proceed with the scheduled mediation despite his opponent's absence.

It is easy for a party to avoid sanctions – appear or obtain a mutual stipulation. Otherwise, the non-appearing party will have to foot the full bill. Be sure that party is not your client.

This article is one in a series of periodic articles concerning mediation topics such as use, legal developments, and negotiation tactics. Blane G. McCarthy is a Jacksonville civil trial lawyer and certified circuit civil mediator. For questions, comments, or suggestions on future articles, please call (904) 391-0091 or email at bgmccarthy@sprintmail.com.