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Mediation Notes

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The Funny Thing About "Authority" at Mediation

During mediation or after impasse, one side sometimes complains to me that the other side did not bring someone with "full authority," and the ostensibly aggrieved party's attorney sometimes tells me they might seek sanctions. Sanctions for allegedly deficient authority are notoriously difficult to achieve for many reasons.

Florida Rule of Civil Proc. 1.720 was amended a few years ago, primarily in an effort to ensure that defendants and their liability carriers in attendance at mediation are prepared to make a deal. The drafters added subsection (e), requiring a certification of authority by each party to identify who will be attending and to confirm they have the authority (without further consultation) required by subdivision (b). See the 2011 Committee Notes following Rule 1.720. Attendance with authority under subparagraph (b) requires a carrier representative with authority to settle in an amount equal to the policy limits or the plaintiff's last demand, whichever is less, without further consultation. The rule only applies by stipulation or to court-ordered mediations.

The purpose of the certification requirement is laudable. There is ample literature arguing that in-person attendance by key decision makers produces a higher rate of settlement. My own experience as a mediator and as an advocate is consistent. Having key people on the phone makes it harder to get a deal done because, as psychologists will tell you, there is little or no emotional or psychological "investment" in the mediation process by the remote attendee. Remote attendees who are not "invested" in the process don't work as

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hard at the end of the day to make a deal.

However, there are more than a few problems with the authority/certification rule. First, the certification must be from a "party." Typically, an insured party defendant has no control over whom the insurance company selects as its representative. So the literal language of the rule imposing a duty of "certification" upon a "party" defendant is unfair and unrealistic.

There is a more fundamental problem. The rules and case law clearly provide that sanctions can be imposed for failing to have someone present with requisite authority. See Rule 1.720(f). Therefore, if someone admits they lack authority, there should be sanctions, right? As the venerable Lee Corso would cry, "Not so fast!" If a party files a motion for sanctions and seeks to introduce evidence of a statement tending to prove one lacked the requisite authority, you will likely meet with an objection. Statements made during mediation are privileged under Chapter 44 and are subject only to the exceptions in Section 44.405(4)(a). The exceptions are for communication used to plan a crime, to prove professional misconduct and other grounds. There is no exception for statements tending to prove the absence of authority. Therefore, if you attempt to introduce an "authority" statement from mediation to seek sanctions, your side is violating the Mediation Confidentiality and Privilege Act, and you get sanctioned! The drafters to Rule 1.720 did not have the ability to create a new statutory exception to the confidentiality rules. So if someone lacks authority, how do you prove it without violating the confidentiality provisions of Chapter 44?

Attendance and authority rules conflict with mediation fundamentals. The parties should decide whom they bring to the table. Self determination, flexibility, and the needs and interests of the parties are by rule paramount. See Mediator's Standards of Conduct Rule 10.230 — Mediation Concepts; Rule 10.310 — Self-Determination. If a party or insurance carrier does not believe the case warrants the involvement of a high-level representative and that someone else is better able to negotiate a deal, so be it. The marketplace ultimately

rewards good mediation decisions and punishes inefficient or ill-informed decisions. If you consistently fail to send the right person, you should feel the consequences. Sometimes, the owner or general manager who ostensibly satisfies the "authority" requirement is not the best person to negotiate a deal.

One might ask, "Why should coverage limits or the plaintiff's last demand dictate whom you bring to negotiate?" Each side most certainly should focus on attendance. But to be philosophically consistent and true to the spirit of mediation, attendance should be self-determined, like everything else. The best practice is to communicate with everyone well in advance of the mediation session so concerns over attendees can be addressed. If you have "authority" problems at mediation, please recognize that the statutory mediation privilege may constrain your ability to prove the facts to support sanctions. I suggest to attorneys and litigants that they may be better off seeking a second mediation later in the case as opposed to spending the time and effort to file a motion for sanctions that raises privilege problems and alienates the other side. Continued dialogue is likely a better solution than complaining about the authority problems inherent to the dialogue you already had.