

January 1, 2012

  News HOME

Attending a mediation? You must have authority to settle

By Gary Blankenship

Senior Editor

A new civil procedure rule on mediations requiring that attending parties have full authority to settle a case could have serious consequences for attorneys.

Jake Schickel, chair of the Bar's Alternative Dispute Resolution Section, reported to the Bar Board of Governors last month that the section is following up on the [revised Civil Procedure Rule](#) 1.720, which was approved by the Supreme Court on November 3 and became effective on January 1.

He noted that many lawyers are not aware of the rule, which came from the Committee on Alternative Dispute Resolution Rules and Policy and did not go through the Bar's normal rule review process. While the proposal was reviewed by the Civil Procedure Rules Committee, it was not reviewed by the Board of Governors.

Schickel, in an interview, said a problem with mediations has been when parties have to call someone outside the meeting to get permission to make or accept an offer.

"If you have to call up and get authority or call and get permission, then the person making the decision is not in the loop," he said.

"They are not told the reason why; they will not have heard each person's position on where they are on the settlement; they will not have heard the mediator's comments and the back and forth of the session.

"If the decisionmaker is not there, then an effective part of the mediation has been lost."

Parties were supposed to have the authority to settle under the old rule.

However, "while the person who was there may have represented they had the authority, if the mediator finds out during the course of mediation that the person does not have the authority to settle, because of the confidentiality of the mediation, there is nothing the mediator can do," Schickel said. "What this new rule does is require that each side certify that they do have the authority to settle the case."

He noted that foreclosure mediations were plagued with representatives from banks who not only didn't have the authority to settle, but frequently were unfamiliar with the details of the case. While the new rule addresses that, it adds a pitfall for the lawyers in the case.

"If the lawyer finds out during the course of the mediation that his client doesn't have the authority, that puts a tremendous burden on the lawyer who has made a representation to the court that his client did have full authority," Schickel said. "This gets to the lawyer-client aspect of it. My concern is it's going to put the lawyers in an awkward situation and one that they're going to have to deal with."

“From a mediator’s standpoint, this is a good rule, because it brings to the party everyone who has authority, and it takes the mediator out of dealing with confidentiality, but it puts a great deal of pressure on the lawyers,” he added. “As a practice, I think lawyers are going to get something in writing from their client, ‘Yes, this is who is going to attend, and they have full authority,’ rather than rely on just a telephone call.

“It’s going to be interesting as we get involved with commercial litigation as well as personal injury.”

New Rule 1.720(c) reads: **“Party Representative Having Full Authority to Settle.** A ‘party representative having full authority to settle’ shall mean the final decision-maker with respect to all issues presented by the case who has the legal capacity to execute a binding settlement agreement on behalf of the party. Nothing herein shall be deemed to require any party or party representative who appears at a mediation conference in compliance with this rule to enter into a settlement agreement.”

Subsection (e) of the rule requires that 10 days prior to the mediation participants file a certification of who will be attending the mediation on behalf of the party and who has the authority to settle the case.

A new comment to the rule says, “Mediated settlement conferences pursuant to this rule are meant to be conducted when the participants actually engaged in the settlement negotiations have full authority to settle the case without further consultation. . . . [T]he party representative must be the final decision-maker with respect to all issues presented by the case in question. Second, the party representative must have the legal capacity to execute a binding agreement on behalf of the settling party.”

The comment notes that failure to reach an agreement does not mean a representative lacked authority to make an agreement.

Aside from getting word out on the mediation rule change, Schickel told the Board of Governors that the Alternative Dispute Resolution Section, which now has more than 700 members, provided input when the Supreme Court sought comment on mortgage mediation efforts. It has also published its first newsletter, available on the section’s website, has put on its first CLE program, and is planning more. The section’s executive council, he said, is meeting monthly as the section gears up its activities.