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Mediation Advisory

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SANCTIONS ARE AVAILABLE WHEN A PARTY OR THE PERSON WITH SETTLEMENT AUTHORITY FAILS TO APPEAR AT A COURT ORDERED MEDIATION OR MANDATORY SETTLEMENT CONFERENCE

Have you ever been frustrated when showing up for a court ordered mediation or mandatory settlement conference ("MSC") only to find the other side is represented by a lawyer unfamiliar with the case and/or is without their client or insurance representative? For court ordered mediations, California Rules of Court, Rule 3.894(a) requires the attendance by the party, corporate representative with full authority, governmental representative with authority to recommend agreement, or an insurance representative with authority to settle or recommend settlement, unless excused by the mediator. Regarding MSC's, Orange County Local Rules, Rule 316 G, has similar requirements.[1] Trial counsel and a party or insurer with full authority must be present, unless the court has excused personal attendance. For MSC's, the path to sanctions is direct. Pursuant to Rule 316E. "The failure of any person to prepare reasonably for, appear at, or participate in good faith in a settlement conference as required by this rule, unless good cause is shown for that failure, is an unlawful interference with the proceedings of the court, and the court may order the person at fault to pay the opposing party's reasonable expenses and attorneys' fees."

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[1] Rule 316, G. Duties of Parties and Insurance Carriers

1. Duties of Plaintiffs and Cross-Complainants

a. All plaintiffs and cross-complainants must be personally present. An appearance by an attorney claiming to have settlement authority does not satisfy this requirement.

b. If a plaintiff and/or cross-complainant is an entity other than a natural person, **all persons whose consent to a settlement is necessary must be present**, unless the representative present has written authorization, signed by all persons whose consent is required, extending unlimited and unconditional authorization to that representative to enter into a settlement.

2. Duties of Defendants and Cross-Defendants

a. All defendants and cross-defendants must be personally present, unless an insurance carrier acknowledges an unqualified and unlimited duty to indemnify in connection with the matter in litigation and the consent of the client to the settlement is not required. An appearance by an attorney claiming to have settlement authority does not satisfy this requirement.

b. If the defendant and/or cross-defendant is an entity other than a natural person, **all persons whose consent to a settlement is necessary must be present**, unless the representative present has written authorization, signed by all persons whose consent is required, extending unlimited and unconditional authorization to that representative to enter into a settlement.

3. Duties of Insurance Carriers

Each insurance carrier which acknowledges a duty to indemnify the defendant(s) and cross-defendant(s) and each insurance carrier as to which any party contends there is a duty to indemnify the defendant(s) and cross-defendant(s), whether such contention is disputed or not, must have a representative present. **Such representative must be a person who has the unlimited and unconditional authority to enter into a settlement**. All persons whose consent to the settlement is necessary must attend the settlement conference. (Bolding in original.)

What can you do if the adverse party violates the attendance rules in the context of a court ordered mediation. In *Burke v. Newegg Enters.*, 2014 Cal.App.Unpub. LEXIS 7948 (Cal.App.2d Dist. Nov. 5, 2014) the defendants sought summary judgment and "also filed a motion for sanctions….for a party's failure to attend a court ordered mediation." Defendants' motions were brought under California Rules of Court, Rule 3.894, and Los Angeles Superior Court Local Rules, Rule 3.272, which require all parties and attorneys of record to attend all mediation sessions in person. It was also based on California Rules of Court, Rule 2.30(b), and Los Angeles Superior Court Local Rules, Rule 3.10, which authorize sanctions for failure to comply with the court's rules without good cause. Respecting the sanctions motion, on appeal, the court had little difficulty disposing of the appellants' challenge. "Burke argues that the trial court erred in awarding sanctions to Newegg because Burke demonstrated good cause for her failure to attend the mediation. We review the trial court's order awarding sanctions for abuse of discretion. (*Ellerbee v. County of Los Angeles* (2010) 187 Cal.App.4th 1206, 1217 [citing *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1364].) We reverse "only if the trial court's action was 'arbitrary, capricious, or whimsical.'" [Citations.] (*Ellis v. Toshiba America Information Systems, Inc.* (2013) 218 Cal.App.4th 853, 878.) Under this standard, Burke cannot meet her burden to affirmatively demonstrate error in the trial court's ruling. While Burke is unpublished and may not be cited, it is a rich source of authority for a sanctions motion for failure of the appropriate party representative to appear for a court ordered mediation. The citation to California Rules of Court, Rule 2.30(b) as a source of the power to sanction is particularly useful.

The same principles apply to a mediation on appeal, pursuant to the Appellate Court Rules. In a published case, *Campagnone v. Enjoyable Pools and Spas Service and Repairs, Inc*. (2008) 163 Cal.App.4th 566 the Court of Appeals sanctioned a party for failing to notify and produce an excess insurance carrier at the appellate court ordered mediation. Again, the appellate court had little difficulty concluding that the court had the power to sanction for failing to appear. "We conclude the unauthorized failure of a party, the party's attorney, or a representative of the party's insurance carrier, to attend a court-ordered appellate mediation necessarily constitutes conduct that is an unreasonable violation of local rule 1(d)(9), warranting imposition of sanctions (local rule 1(g)). This is so because it is self-evident that for a mediation to succeed, each of them must attend every mediation session in person, with full settlement authority." "It follows that the measurement of sanctions for a failure to comply with local rule 1(d)(9) can be made without information other than the violation itself. Because the rule violation necessarily undermines the mediation process, it is self-evident that the time spent by the other party, its attorney, and its insurance carrier's representative has been wasted. Thus, at a minimum, a reasonable sanction is the cost of their wasted time for a period of four hours (see local rule 1(c) [appellate mediation services are furnished by the court, without fee to the parties, for a period of four hours, after which they and the mediator may agree to continue mediation at the parties' expense through a fee agreement with the mediator]), plus the court's cost to process the sanctions motion." Id. at p. 572.

Please note that these authorities only apply to court ordered mediations and settlement conferences. **A private mediation does not bring the court rules into play.** Therefore, it is useful to have the court order the parties to mediation at the initial status

conference, thereby invoking the Rules of Court. ["Your honor, it would be useful for the court to order this matter to mediation, rather than to have us stipulate, because in the court ordered context all of the court rules apply."] Mediation by court order also allows the prevailing party to recover its share of the mediation fee. *Gibson v. Bobroff* (1996) 49 Cal.App.4th 1202, 1207-1209. Alternatively, you should have an agreement prior to the mediation specifying who will attend for each side, and indicated that these parties must have full authority to settle. You might even provide for a remedy for failure to abide by the agreement to provide proper persons with authority.

A MOTION TO STAY LITIGATION PENDING ARBITRATION MUST BE DENIED IF NO PETITION TO COMPEL ARBITRATION HAS BEEN FILED AND NO ARBITRATION IS PENDING

Wells Fargo Bank. N.A. v. The Best Service Co., Inc. (2014) 2014 Cal.App.Lexis 1151 holds that the court lacks jurisdiction to rule on a motion to stay an action pending arbitration if there is no pending motion to compel arbitration filed under California Code of Civil Procedure Section 1294 (or unless arbitration is already pending.) In that case, Best filed a motion to stay arbitration, citing the arbitration provision in the agreement between them. The court of appeal affirmed the denial of defendant's motion to stay the lawsuit. The court stated: "Here, … there is no pending arbitration. Nor did defendant file a motion or petition to compel arbitration. Thus, there is no oral or written order dismissing or denying a petition or motion to compel arbitration. There is no functional equivalent of an order dismissing or denying a petition or motion to compel arbitration." As a result, there was no statutory basis to stay the action pending arbitration, because CCP section 1294 was inapplicable where there is no pending arbitration or petition to compel arbitration.

SETTLOR'S REMORSE WILL BE GIVEN SHORT SHRIFT WHERE A SETTLEMENT IS DOCUMENTED AT MEDIATION

In *Jing Jang Dan v. Rambla Vista Enterprises* 2014 Cal.App.Unpub. LEXIS 8500, the defendant attempted to back out of a mediated settlement, asserting: that the stipulation for settlement was unenforceable because (1) it was not signed by defendants' counsel, (2) it called for the creation of further documents and did not express "a meeting of the minds on all terms between Plaintiff and Defendant[s]," and (3) "it was only entered by mistake, inadvertence, surprise, or excusable neglect," because Rambla Vista's principal, Gushiken, was not aware of its terms and was pressured into signing after a long session late at night. The trial court rejected defendants' argument concerning the absence of a signature from defendants' counsel, stating that the argument "relies on

cases where an attorney of record was bypassed in the settlement process," which did not happen here. The trial court rejected the argument concerning missing terms and the creation of additional documents, reasoning that the stipulation for settlement "is thorough and comprehensive" and the documents to be created (i.e., a release and a dismissal) "merely carry out the comprehensive terms of the agreement." And the trial court rejected the argument based on mistake and excusable neglect because it was based on a declaration by Gushiken that was "not credible or persuasive, and it does not establish grounds for disregarding the settlement." The court awarded Dan attorney fees and costs in bringing the motion to enforce the settlement. The court of appeals affirmed, holding that the agreement was comprehensive, that there is no requirement that an attorney sign a settlement agreement, and there was no abuse of discretion in the trial court's findings that Gushiken was not forced to sign based by undue influence, notwithstanding that he was elderly, had impaired hearing (the agreement was written) and was given a limited amount of time to sign (the signature was placed 4 days after the mediation session.)

If you would like further information, please contact your Rutan attorney.
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