

Mediation – Eliminate the Impact of Remorse
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“The foolish and the dead alone never change their opinion.” James Russell Lowell.

We encounter it almost daily – in ourselves, our families, and our clients. Second-guessing is the impulse of everyone with a pulse.

In the business environment, it is termed “seller’s remorse” or “buyer’s remorse”. Did I pay too much for that car? Was I too easy in conceding to my customer’s demands?

The situation frequently arises in the context of a Mediation settlement agreement.

Our Jacksonville legal community is one of the last bastions of professional civility in the state. Here, attorneys stipulate to such things as waiver of party appearance at Mediation. One of my prior articles highlighted the sanctions that are visited upon a party whose absence is unexcused. On the flip side, two recent cases highlight the danger to the gracious party who excuses his opponent from the Mediation.

In Scott v. Tischler, 882 So. 2d 461 (Fla. 4th DCA 2004), one claimant in a multi-party dispute did not attend the Mediation conference. It appears that his absence was excused and that his attorney attended in his stead. The others signed off on the Mediation settlement agreement, assuming that the absent party would do likewise. That did not happen, and, seventeen months later, the DCA ruled the agreement a nullity.

Similarly, the Plaintiff in Sharick v. Southeastern Univ. of the Health Services, Inc., 2004 Fla. App. LEXIS 17045 (Fla. 3rd DCA 11/10/04) refused to sign off on a settlement that was supposedly made by his attorney with his permission. The court declared that “absent clear and unequivocal authority” the proposed settlement was void. “An attorney’s belief that he or she has the authority to settle does not alone establish such authority.”

The holdings of these cases are not surprising. Of course a party should not be bound by an agreement it did not make. Yet, the nuances of such a situation are frequently unseen until it is too late. I cannot prove it, but I suspect that the attorneys in both of these cases acted out the authority given by their clients, only to later be unable to prove it when their clients cried foul.

More importantly, each of these scenarios arose because one party accommodated the other and excused his adversary’s personal attendance. I make this point not to squelch cooperation and accommodation, but to remind us all of the risks of doing so.

Mr. Lowell suggests that only the living change their minds. Since that class of person predominates our legal disputes, it is wise to protect against such second-guessing. Insist that the parties attend the Mediation or, if impossible, arrange for the absent party to be a mere fax machine away. Unless all of the parties have signed off on it, your Mediation settlement agreement may lack enforceability and cause you remorse.

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.