

Ken Bouchard on Rule 170: Reconsider 'All Parties' Must be Present  
June 10, 2008

I wish to comment on the proposed Rule 170. First, let me say that I applaud the court's attempt to have mediations handled with as little involvement with the court as possible. Parties are now free to choose the location and date of the mediation as well as the mediator involved. I predict that once the kinks are out of the system, this will take a huge burden off the courts, which is undeniably a good thing.

My concern is the requirement that "all parties" must be present should be reconsidered. I am referring here to only those cases where the defendant is not a corporation but is an individual and is insured, and the carrier representative will be present.

I have served as a mediator in numerous cases and settled hundreds to thousands of other cases by mediation, so I am a strong believer in the process. The old rule provided that an insured defendant must file a motion to be excused from appearing at the mediation. Alas, I can tell you that this was not what was routinely being done. The new proposed rule states that all parties and their counsel must attend unless excused by the court. In my opinion, the presence of the actual defendant is usually unnecessary and sometimes counterproductive. In 90 percent or more cases, the defendant does not wish to attend. Frequently they have relocated and it would be burdensome and expensive for them to return to New Hampshire. Frankly, in most cases I have experienced, they simply don't care and want the insurance company to get rid of the case. Very occasionally, they are adamant that no payment should be made because they claim that they were not in any way at fault. In such cases the defense attorney should always comply with that request. After all, the defendant is the attorney's client, and the usual ethical canons apply. The clients do recognize, however, that the insurance carrier can settle as the carrier sees fit, of course at its own risk.

I do not see the need for court intervention in this part of the process. Client defendants should be free to attend or not, as they sit fit. If they want to come, they can. If not, why force them to appear or force their lawyers to file a motion? If strict compliance was required, the courts would literally get hundreds of motions, which would routinely get granted, but not always before the mediation.

In my opinion, having to file a motion to excuse the presence of the defendant in the above situations is a significant burden on the court, and is quite unnecessary and unduly expensive. It is also out of step in the proposed process to put the burdens on the litigants to arrange for mediations.

Perhaps the rule could state that "In the case of an insured non-corporate defendant, the defendant must be notified of the mediation and can attend if desired." That would make it clear that the defendant has the absolute right to attend for any reason, and the occasional adamant defendants could still exercise that right.

I would be pleased to discuss this with any members of the committee if desired.

Respectfully Submitted,

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