

# Can Attorneys be Sanctioned if Their Client Fails to Appear at Mediation?

**Judge Abraham J. Gafni (Ret.)**

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Increasingly, courts are directing parties to mediate their disputes prior to trial. Failure to appear at the mediation can subject a party to court-imposed sanctions. But may the attorney whose client does not comply with the court's order face sanctions as well? An opinion from the U.S. Court of Appeals for the Eleventh Circuit discussed the circumstances under which such a result might occur. See *Miller v. Midland Credit Management*, Case No. 20-13390 (11th Cir. 2021).

The plaintiff had filed a class action lawsuit, asserting violations of the Fair Debt Collection Practices Act. The district court issued a scheduling order referring the case to mediation, to be conducted by June 4. When that deadline passed and the record did not reflect that the mediation had occurred, the court directed that the parties file a status report.

After some exchanges between the court and the parties, the court noted that the parties had not addressed "why despite their diligence they have been unable to mediate by the mediation deadline." The court, however, did extend the deadline until June 16, and ordered that the parties file a mediation report the following day. The parties were further instructed to explain any additional requests to extend the mediation deadline.

On June 16, the mediator filed a report that the mediation could not proceed because although the plaintiff's attorneys had appeared, the plaintiff had not. The defendant filed a status report requesting that the court enter sanctions against the plaintiff for her failure to

appear. One of plaintiff's attorneys also filed a status report noting that he did not know why the plaintiff had not appeared, that he had been in touch with her on June 14 when she had confirmed that she would be attending the mediation, and that despite attempts to reach her, he had not heard back from her.

On June 19, the court entered an order to show cause why the plaintiff failed to appear at the mediation and also "address whether they have regained contact with their client." The court recognized that while its order may appear to be "harsh in isolation," "there were many other examples of the plaintiff's lack of diligence."

Ultimately, the plaintiff responded that counsel had regained contact with her and explained that she could not attend because she was let out of work late and had no access to a phone to advise her attorneys.

The court then imposed sanctions not only on the plaintiff but also on her attorneys. In setting forth the reasons for imposing sanctions against the attorneys, it stated:

"Had I not entered the order to show cause ... there is no indication that the plaintiff or her counsel would have made known to the court the circumstances surrounding her failure to appear. Counsel should have made a prompt and reasonable investigation into the plaintiff's failure to appear and immediately informed the court of the reasoning for same. Counsel did not. This led to my entry of the order to show cause and it was only then that counsel investigated and discovered the circumstances surrounding the plaintiff's failure to appear."

Following settlement, the court denied the plaintiff's motion seeking reconsideration of the sanction order, which included details of the efforts the plaintiff's attorneys had made to reach the plaintiff. The plaintiff's attorneys appealed.

The appellate court recognized that its review must include an inquiry into whether the court had abused its discretion. In this regard, a court has the authority to "impose sanctions for litigation misconduct under its inherent power." This inherent power "is vested in courts to manage their own affairs so as to achieve the orderly and expeditious

disposition of cases.” This power, however, must be exercised with “restraint and discretion.” In particular, such an exercise of discretion “must comply with the mandates of due process.” Such due process “requires that the attorney (or party) be given fair notice that his conduct may warrant sanctions and the reasons why.” In addition, the court is required to give the attorneys “an opportunity to respond, orally or in writing, to the invocation of such sanctions and to justify their actions.”

In ruling that the attorneys had not been afforded due process, the court explained:

- The attorneys were not provided with fair notice that the court was considering imposing sanctions against them for their client’s failure to appear at the mediation. In particular, the scheduling order only stated that “the court may impose sanctions against parties or counsel who did not comply with” mediation requirements.
- Here, however, the attorneys, unlike their client had complied as they did attend the mediation.
- The defendant requested that sanctions be imposed but only against the plaintiff, not against her attorneys.
- The order to show cause similarly did not give fair notice of actions by the attorneys which might warrant the imposition of sanctions. It ordered that the plaintiff show cause why she failed to appear at the mediation. The attorneys, however, were only ordered to “address whether they have regained contact with their client” (a direction that was repeated twice in the order). Indeed, the court’s order specifically recognized that “representation requires communication. The plaintiff’s counsel cannot continue to represent the plaintiff if she has abandoned their representation and more generally this lawsuit.”
- In eventually addressing the court on the issue, the plaintiff’s counsel only informed the court that they had regained contact with the client and requested that sanctions not be imposed against her alone. They did not even address the possibility of any potential sanctions against themselves, further reflecting that they were not on notice of such a possibility.

The appellate court concluded that the trial court appeared to be considering the imposition of sanctions against the plaintiff alone but not against the attorneys; thus, they were not given meaningful notice or an opportunity to respond to that threat.

This, of course, did not mean that the issue was closed. The district court’s order was only vacated, and the matter remanded; the lower court still had the right to consider the imposition of sanctions against the plaintiff’s attorneys, but only if it afforded them the due process requirements noted.

One other requirement was noted by the Eleventh Circuit should the district court reopen the matter and decide to impose sanctions. “Before awarding sanctions under its inherent powers, however, the court must make an explicit finding that counsel’s conduct ‘constituted or was tantamount to bad faith.’ (quoting *Roadway Express*, 447 U.S at 767).”

Here, however, the district court never mentioned or cited the bad faith standard. Accordingly, the appellate court concluded that “On this record ‘we cannot glean ... whether the district court’s outrage at the plaintiff’s attorneys stemmed from the belief that the attorneys acted in bad faith, or whether it was due to a belief that that they acted negligently or without due diligence.’”

In summary, there does exist a risk for the imposition of sanctions against a party who has acted inappropriately, even with respect to a court-ordered mediation procedure to be conducted out of court. These sanctions may also be visited upon the attorneys, however, if it may be demonstrated that they acted in bad faith in not acting in a manner designed to urge their client to act in accordance with the court’s orders or in failing to advise the court promptly when such noncompliance has occurred. As the court may later inquire into the steps taken by counsel when a client has failed to comply, counsel would be well-advised to maintain a record of all written and oral communications to reflect that they have acted diligently in seeking to comply with the court’s order.

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