Best Practice Newsletter

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The USDC., E.D. MO. has established a significant "Good Faith" component in court ordered mediations and will look into what happened during the mediation. Counsel should definitely comply with the court's directives regarding mediation.

In the case of Gee Gee Nick vs. Morgan Foods [99. F.Supp.2d 1056 (USDC, E.D. MO. 2000); upheld, Eighth Circuit at 2001 U.S.App. LEXIS 23895 (Nov. 5, 2001)], Judge Sippel inquired into nature of the participation by the parties in a court-ordered mediation and ruled and that the Defendant (Appellant) and its counsel did not act in good faith and were subject to court ordered sanctions.

In Nick the court entered an Order Referring Case to Alternative Dispute Resolution that required attendance by a corporate representative with settlement authority, delivery of a required memorandum to the mediator and that the parties participate in good faith. While outside counsel attended, the required memorandum was not given to the mediator. Additionally, the corporate representative did not have independent knowledge of the facts and only possessed settlement authority up to $500.00. Any settlement offer over $500 had to be relayed via phone to in-house counsel who chose not attend on the advice of outside counsel. Two offers of settlement were extended by Nick and were rejected by Appellant and the mediation ended shortly thereafter.

The court decided that the failure to:

- Deliver the required memorandum to the mediator;
- Have a responsible corporate representative capable of participating meaningfully in the negotiations attend the mediation;

evidenced a lack of good faith. Judge Sippel sanctioned both outside counsel and the Defendant. Outside counsel did not appeal the sanctions and the Eighth Circuit upheld the sanctions against the Defendant.

The United States District Court for the Eastern District of Missouri has proposed revisions to Rule 16-6.02(b) which fine-tunes the obligations of the parties regarding attendance by responsible individuals.

The implications of the case and the rule changes are that the United States District Court for the Eastern District of Missouri will look into the mediation to see what took place and will not hesitate to assure that the parties are negotiating in good faith. So our advice is the same that you give your client, follow the rules and avoid the problems that violations cause.

When mediating with an agency of the Federal Government, keep in mind that communications in joint sessions are not confidential. If you wish to protect the confidentiality of the session, include a clause in your agreement to mediate that expands confidentiality protection.

The Federal Alternative Dispute Resolution Counsel recently clarified the level of confidentiality contesting parties may expect while mediating with any branch or agency of the Federal Government. With all parties present in joint session no confidentiality attaches to anything spoken or presented to the other side. To avoid chilling the candor of these sessions the parties should raise the level of confidentiality through an agreement. A properly worded agreement signed before the mediation begins may protect the confidentially of the entire session. Still, information obtainable through the Freedom of Information Act may not remain confidential.

United States Arbitration and Mediation, Midwest, Inc. uses the following language to assure the maximum degree of confidentiality in our mediations.

“If any party is a Federal Agency, all parties agree that the applicability of the ‘Confidentiality in Federal Alternative Dispute Resolution Programs’ as published in the Federal Register/Volume 65, No. 251 on Friday, December 29, 2000, are waived, except as to the applicability of the Freedom of Information Act.”

So our advice is don’t leave home without it. A strong confidentiality clause, that is!

When mediating, consider the jurisdiction that will be ruling on issues pertaining to the mediation as different jurisdictions have different expectations of what mediator confidentiality means.

Missouri case law and Missouri Supreme Court Rules provide that mediation confidentiality shall be strongly protected. Supreme Court Rule 17.05(b) provides the court shall only be advised by the parties that they "…were successful in resolving their dispute or that issues remain open and unresolved." In the case of Kenny vs. Emge, 972 SW2d 616 (Mo. App. E.D.1998), the Court held that a mediator should not be called to testify on anything relating to the mediation with the court relying on RsMo. 435.014 (1997). The court indicated that the application of Supreme Court Rule 17 would bring the same result.

Contrast Emge with the case of Olam vs. Congress Mortgage Co., 68 F. Supp3d 110 (N.D.Cal 1999) which involved a district court ordered referral to mediation. After a settlement was reached, plaintiff attempted to avoid the settlement, claiming that it was unconscionable, and that she was incapable of giving legally viable consent as a result of undue influence. In subsequent proceedings, plaintiff waived the mediation privilege and defendant agreed to a limited waiver of the mediation privilege. The District Court Judge compelled testimony of the mediator and called the mediator after the other participants testified, in closed proceedings, under seal.

In its order requiring testimony of the mediator, the court applied a balancing test that compared the interests that might be threatened and the interests that might be advanced by requiring the mediator to testify under seal. The court concluded that the mediator's testimony was crucial to making a just decision.

So where does this all leave counsel? Know your jurisdiction and its attitude toward confidentiality. (See the next Best Practice Tip for information on the USDC, E.D. MO. view of "confidentiality" vs. "good faith").