Best Practice Newsletter

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The Uniform Mediation Act...
Do We Need It? Do We Want It?

By Michael Geigerman

With the recent passage and approval and recommendation for enactment of the Uniform Mediation Act (UMA) in all fifty states by the National Conference of Commissioners on Uniform State Laws (August, 2001) and the ABA House of Delegates (February, 2002), it is time for mediators and interested parties to consider the impact of this legislation on Missouri mediation practice. The legal community should carefully weigh support for the UMA. Before jumping on a band wagon that Florida, Texas, California, and Pennsylvania and many other states will not ride, Missouri must seriously consider whether we a need remedial mediation statute.

The UMA will significantly impact the mediation process, and this impact may not all be for the better. The International Academy of Mediators (IAM) has passed a resolution opposing the adoption of the current version of the UMA in the states because of a number of concerns over UMA confidentiality provisions (Resolution passed at IAM's November, 2001 Conference). In an open letter to the IMA Committee, IAM President Steven L. Schwartz explained why the IAM took issue with several sections of the UMA. The most controversial sections were Section 9, which governs the assertion of mediation privilege; Section 2(2), which defines "mediation communication"; and Section 6(A)(4), which defines the privilege exception for "Criminal" conduct.

Missouri's existing confidentiality statute (RSMo. 435.014(2)) and Supreme Court Rule 17 provide for confidentiality of communications made during the course of the mediation. Currently, in Missouri, mediation discussions are treated as settlement negotiations and communications in mediation are, as such, confidential. Under the UMA, a wide swath is cut eliminating confidentiality protection in several areas.

There are numerous copies of the Uniform Mediation Act available on-line. Two may be found at www.ronkelly.com or at www.pon/harvard.euc/guests/uma/.

The loss of confidentiality coupled with latent and clear ambiguities in the UMA give this author concern lest we sweep away Missouri's existing confidentiality provisions. May be we should, may be we shouldn't adopt the UMA in Missouri, but in any event we must carefully review it. Let's think before we act!

Ten Suggestions For The Advocate Mediating The Complex Case

By George Fitzsimmons

Mediation of the major case has become popular in recent years because of a simple reason: Mediation results in settlements. In my experience as a mediator, more than 85% of mediated cases settle as a result of the mediation. Clients frequently are more satisfied with the settlement than they would otherwise be because they have taken a key role in the settlement process. A mediated settlement avoids litigation expense, firm personnel expense, and the uncertainty of the jury verdict to both sides in the lawsuit.

In preparing for a mediation, the attorneys should consider the following:

Select of the Mediator

The attorney should choose a mediator carefully by considering the mediator's litigation background, credibility with all parties involved, experience as a mediator and the ability of the mediator to settle cases. The attorney should not reject a mediator merely because the other side suggested that mediator as that person has instant credibility with them.

Attendance at Mediation

The attorney should be absolutely certain that all persons with decision-making authority attend the meeting in person. It is not enough that the decision maker is "available by telephone."

Preparation of the Parties

All parties should be fully prepared by their attorney as to the format of the mediation. The attorney should discuss the client's role in the mediation and the strategy to be followed during the mediation. In this way, the client will feel that he is part of the mediation process and not merely a spectator. A client who is able to explain his position and the reasons therefore can be very effective in the negotiation process.

Preparation of the Attorney

The preparation for the mediation is much different than preparing for trial. The attorney should be prepared to not only discuss the facts of the case and the applicable law, but also to creatively approach the negotiation. The creative approach should consider the needs of both sides at the mediation if there is to be a settlement. For instance, the defense may want a confidentiality agreement, the payment of a portion of the settlement over time, and sharing of court and mediation costs.

Preparation of the Mediation Statement

The attorney should thoroughly present the case and the law in the mediation statement. Frequently, the attorney chooses to provide the statement only to the mediator. The attorney should consider whether it would be better to also supply a copy of the mediation statement to the opposing side as the goal of the mediation is to convince the opponent and the mediator may waste valuable time in explaining the position to the defense. The attorney should also decline to make any personal attack on the opponent during the opening statement as this will anger the opponent and harden negotiating positions.

Negotiation Strategy

The plaintiff's attorney should consider an opening settlement demand that is in the fair range of settlement discussion. Excessive opening demands place a chilling effect on negotiations and may push the defense away from the mediation process. The settlement demand should be accompanied by reasons and analysis to support its validity. By the same token, the defense should consider an opening offer that responds to this reasonable demand settlement.

Be Flexible

The attorney should condition his client to keep an open mind as to settlement as new information frequently is disclosed during the course of the mediation. If either side has a "drop-dead" figure in mind before negotiation begins, it is often difficult to persuade the client of the reasonableness of a settlement offer based on newly disclosed information.

Mediation Psychology

The attorney should prepare the client for the emotional and psychological aspects of the mediation. The attorney should realize that emotional issues such as the death of a spouse or loved one, loss of employment, competence of the defendant, and similar issues frequently need to be vented on both sides before serious settlement discussions can occur.

Preparation for the Caucus

The attorney should prepare himself and the client for private sessions with the mediator. The attorney should be prepared to strategize with the mediator as to the client's financial and other needs.

Closing the Deal

The attorney should discuss additional needs beyond money with the mediator before the settlement is concluded. The attorney should prepare a settlement agreement before the mediation so that all important details are negotiated. These would include issues such as confidentiality of the settlement, scope of release, non-disparagement, tax issues, structured payments, payment of court costs and mediation costs and other matters. The attorney should insist that all aspects of the settlement be finalized in writing at the conclusion of the mediation.

The attorney should realize that the mediation process is not about winning but a process of working with the experienced mediator to reach a settlement that results in satisfied clients whose needs have been met through the mediation process.

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Clients Receive More Protection Under Structured Settlements Protection Act

By Michael Geigerman and Kevin Frank
(Kevin Frank is a student at the Washington University School of Law)

Many objections to structured settlements are raised during mediations. One of the problems has now been resolved in a manner that protects the beneficiary. Simply stated, it is now more difficult for the annuitant to sell his/her interest in the structured settlement.

In January, President Bush signed the Victims of Terrorism Relief Act of 2001 (PL 107-134, 2002 HR 2884, 115 Stat 2427) into law. This statute fully incorporated the language of the Structured Settlements Protection Act, creating major tax implications for transactions involving transfers of structured settlements. Such transfers will now be taxed at 40% of the "factoring discount" of the transaction. The factoring discount is the difference between the amount paid to the original holder of the structured settlement and the value of the remaining payments in the settlement.

This extra tax will not be applied if the settlement transfer is approved in advance. Approval guidelines are set forth in the Act, but approval can also be established under applicable state laws. In both Missouri and Illinois, existing state statutes require court approval before sales of structured settlements (RsMo. 407.1062; ILL ST CH 215 S 5/155.34). If proper approval is obtained prior to a transfer, structured settlements can be reassigned without losing their favored tax status. It is also noteworthy that a truly fair exchange would not suffer under this bill, since there would be no factoring discount to be taxed. The purpose of the bill is to prevent owners of the structured settlements from being taken advantage of, not to prevent all transfers.

The Missouri statute is actually more restrictive than the Federal law, since it forbids transfers of structured settlements without court approval, rather than simply imposing a heavy tax. The Missouri statute also forbids any exchange where the purchase price of the structured settlement is less than the fair market value of the remaining payments in the settlement. Approval under the Missouri statute would satisfy the federal requirements and there would be no change in tax treatment.

Illinois' statute prevents insurance companies from making payments on a structured settlement for a personal injury claim to anyone other than the beneficiary of the settlement without the prior approval of the court. It also forbids the beneficiaries of structured settlements from assigning their payments in any manner without the prior approval of the court. Approval under the Illinois statute would satisfy the federal requirements and there would be no change in tax treatment.

Is There an Arbitration Clause in Your Employment Agreement With Your Client?

By Michael Geigerman

The ABA in Formal Opinion Number 02-425 (February 20, 2002) approved the use of a binding arbitration clause for the resolution of disputes concerning fees and malpractice claims between attorneys and their clients. Not a big deal for Missouri attorneys as numerous Informal Advisory Opinions from the Office of Chief Disciplinary Counsel (OCDC) had previously approved their use (see Opinions 990130, 960066, and 940153.)

The OCDC opinions stress that the attorney has an obligation to "...orally point out this provision and to explain it, to the extent necessary for the individual client." (OCDC, 990130). The ABA opinion requires the client to have "…been fully apprised of the advantage and disadvantages of arbitration and has given her informed consent to the inclusion of the arbitration provision in the retainer agreement." (ABA Opinion 02-245).

Of course, Missouri attorneys will need to include the warning provided in Section 435.460R.S.Mo.

It may not be a good idea to have an arbitration clause in the agreement for the following reasons:

- It could be relations nightmare when one considers your innumerable and otherwise satisfied clients;
- It lowers the cost threshold for a disgruntled client to file a fee dispute or malpractice claim.

On a positive note:

- It opens the door for you to discuss ADR with your client;
- It would be proof positive that you are thinking of the welfare of your malpractice carrier and yourself (right now the Bar Plan offers a 2.5% reduction on the base rate if the attorney/firm has a policy to participate whenever possible in a fee dispute resolution program prior to filing suit over fees).