Best Practice® Newsletter

February 2007

USA&M Midwest, Inc.

To Our Client

Today the Best Practice® Newsletter renews its commitment to providing timely updates to our clients on issues pertaining to Alternative Dispute resolution. We hope that you will find the information provided in these pages informative.

We thank you for supporting USA&M Midwest, Inc. This year, as in past years, we have made a contribution in honor of our clients to KidSmart Tools for Learning. To learn more about KidSmart, please visit their website www.kidsmartstl.org.

We are proud to be a client centered service organization providing mediation and arbitration opportunities to the legal community. We look forward to both seeing and working with you in the coming year.

Sincerely,

Michael Geigerman on behalf of the entire staff at USA&M Midwest, Inc.

Upcoming Free CLE Seminar

April 20, 2007

"Winning in Litigation and Dispute Resolution: Critical Decision Making for Litigators"

For more information on our free CLE seminars, please visit our website

www.usam-midwest.com

This Issue:

PLAINTIFF'S EXPERTS PREVENTED FROM TESTIFYING BECAUSE OF IMPROPER DISCLOSURE OF MEDIATION MATERIALS

By Ron Schowalter, Mediator, USA&M

A Michigan Federal District Court recently issued an order that prevented the plaintiff's experts from testifying because plaintiff's counsel gave the experts copies of the defendant's confidential mediation statements and exhibits to assist them in preparing their reports. The court also awarded costs and attorneys fees to the moving defendant. Irwin Seating v. International Business Machines, No. 1:04-CV-568, 2006 WL 3446584 (W.D. Mich Nov. 29, 2006)

The case presents an excellent example of the dangers in providing confidential mediation materials to an unauthorized third party, despite the fact that the underlying information and documents in the materials may be otherwise discoverable.

At the direction of the mediator in a voluntary mediation, the parties each furnished mediation statements and accompanying documents. The defendants also highlighted those portions they believed to be most important. Plaintiff's counsel proceeded to provide these materials to two of its experts to assist them in preparing their reports for trial.

The court order for the mediation expressly stated that "all information disclosed during the mediation session…must remain confidential…." The letter to the parties from the mediator also reiterated the confidentiality of that information. Moreover, local court rules also specifically provided for confidentiality of ADR procedures, such as voluntary mediation. (Continued on Page 2)

PLAINTIFF'S EXPERTS PREVENTED FROM TESTIFYING BECAUSE OF IMPROPER DISCLOSURE OF MEDIATION MATERIALS (continued)

Although all the parties agreed plaintiff's counsel had provided copies of the defendants' mediation and exhibits to the experts, and that the experts had read the materials, both experts denied either of the briefs influenced them in developing their opinions. Furthermore, plaintiff argued that striking the expert witnesses was too severe a remedy.

The court acknowledged that the underlying documents themselves were otherwise producible to the plaintiff's experts. The court noted, however, that the mediation reports and the highlighted portions of the documents selected by the defendants were privileged settlement communications. The court also questioned the experts affidavits in which they denied the mediation materials influenced their opinions, citing virtually identical language in both affidavits, "…it is readily apparent both were drawn up by the same hand."

The court also acknowledged that the sanction was severe – but fair. Here was a problem created solely by the plaintiff's own lawyers. A problem that presented risks that should not be borne by innocent defendants. The court emphasized that there was no adequate way to assess the impact of the mediation briefs and what part they may have played in the experts' preparation of their reports. Namely, "[t]here are simply some things that cannot be forgotten once they are learned." Finally, the court stated sharing the mediation briefs "strikes at the heart of the ADR process", and in a footnote added "[t]he court is aware this resolution [albeit severe] may also have a salutary effect in preserving confidences of future mediation participants…."

OBJECTING PARTY CANNOT BE SANCTIONED FOR FAILING TO ATTEND MEDIATION

By Kim L. Kirn, Mediator, USA&M

A California Court of Appeals recently overturned a lower court decision imposing sanctions on a defendant in a complex construction who, despite its objections to the mediation, was ordered to attend and pay for a portion of the mediation. (Jeld-Wen v. Superior Court of San Diego County, D048782, Court Of Appeal Of California, Fourth Appellate District, Division One, 2007 Cal. App. Lexis 9, (January 4, 2007) The defendant, Jeld-Wen, was a minor player in the litigation and objected when the lower court ordered it and all other parties to mediation with a maximum duration of 100 hours at an hourly rate of $500. It appeared that Jeld-Wen felt its entire liability in the case was less than it would pay for its share of the mediation. Apparently the plaintiff agreed with Jeld-Wen's assessment because plaintiff had made a settlement demand to Jeld-Wen of only $2,799, a nominal amount when compared to total value of the case.

"...described the fundamental principles of mediation as voluntary participation and self-determination by the parties"

California state law provides for mandatory mediation for cases less than $50,000 but allows for voluntary mediation in all other cases. San Diego County Court, the court in which the case was filed, also created its own mediation program available to agreeable parties. However, the San Diego trial court entered a case management order which mandated numerous procedural steps including mediation. The court felt it had the authority to enter such an order pursuant to a California procedural rule which allowed the court to set one mandatory settlement conference. The rule had been previously upheld in Lu v. Superior Court, 55 Cal. App. 4th 1264 (1997)] in which the California appellate court enforced a lower court's order requiring an objecting party to attend and presumably pay for a mandatory settlement conference before a referee. Lower courts had interpreted the Lu decision to mean that they were empowered to order parties to attend and pay for mediation despite the voluntary nature of mediation. (Continued on Page 3)

OBJECTING PARTY CANNOT BE SANCTIONED FOR FAILING TO ATTEND MEDIATION (continued)

In the instant case, Jeld-Wen objected to the court-ordered mediation but lost its bid to halt the mediation. The parties scheduled two mediation sessions initially. Jeld-Wen failed to attend the mediation and was sanctioned $200 by the Court and ordered to attend the next mediation session. Jeld-Wen successfully appealed to the California Court of Appeals.

The appellate court described the fundamental principles of mediation as voluntary participation and self-determination by the parties. The court concluded that ordering mediation for a minor defendant in a complex case who objected to mediation was contrary to the voluntary nature of mediation. The case was distinguished from the Lu case by relying on the terminology used in the Lu case authorizing a "mandatory settlement conference before a referee" versus a "mediation before a mediator" which was used in the case management order in the case at bar. It appears that the court would have had the power to order Jeld-Wen into one mediation session under the Code of Civil Procedure and Lu case, but overstepped its bounds when it ordered the more open ended mediation.

Dividing the Cake Fairly

By Michael Geigerman

Mathematicians find a way to divide a cake fairly using a third party! (Duh and I thought that arbitrators and mediators were able to do that all the time.)

As reported in the December *Notices of the American Mathematical Society* and described in *Science News,* December 16, 2006, pg 390. , Steven Brams of New York University and his colleagues now believe that any heterogeneous product can be divided fairly (defined as, "after the division, each person's assessment of the value of his or her piece is the same") by using a neutral third party to delineate two shares of equal value.

Gone is the "you cut, I select". While that might work for a homogenous article, it will not for the heterogeneous item where size may not be the controlling issue. Bram says that a practical example "might be the joint property to be divided in a divorce." Theorists have struck another blow for mediation. Thanks Guys!

(Editor's note, This serious study began as a way to divide an elaborately decorated cake strewn with fruit and coconuts fairly when there were competing demands for different parts of the cake and the necessity of fairness in value must be maintained.)

"Theorists have struck another blow for mediation"

720 Olive Street
Suite 2300
St. Louis, MO 63101
Phone: (314) 231-4642
Fax: (314) 231-0137
E-mail:info@usam-midwest.com

USA&M Midwest, Inc. is a client based Alternative Dispute Resolution administrator providing a skilled panel of mediators and arbitrators to the Midwest legal, business, and insurance community.

Our mission is to help contesting parties obtain resolution of their dispute through the use of an appropriate dispute resolution process. Our core values include honoring self-determination in the resolution process, a respect for people, and belief in the importance of education.