Best Practice® Newsletter

May 2007

USA&M Midwest, Inc.

To Our Client

We hope that you find this edition of Best Practice® helpful and informative. Many thanks to our three authors: Ms. Kim L. Kirn, Mr. Robert Litz, and Mr. Ronald Schowalter.

Sincerely,

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

This Issue:

NEITHER JAIL NOR SURGERY IS SUFFICIENT EXCUSE FOR MISSING COURT-ORDERED MEDIATION

By Kim L. Kirn, Mediator USA&M

The Magistrate imposed sanctions against two plaintiffs who failed to personally appear at the court-ordered mediation despite excuses from plaintiffs that recent surgery and incarceration prevented them from attending. (Scott v. K.W. Max Investments, Inc., Nos. 6:05-cv-683-Orl-18JGG & 6:05-cv-765-Orl-18KRS, 2007 WL 80851 (M.D. Fla.) (Jan. 8, 2007). Previously, the federal court for the Middle District of Florida had ordered mediation for these two similar cases filed by employees alleging violations by their employer of the Fair Labor Standards Act. When defendants and their counsel arrived at the mediation they were advised by plaintiffs' attorney that neither of the plaintiffs would be physically present for the mediation. Plaintiff Scott was recovering from leg surgery and proposed using a speaker phone to participate in the mediation telephonically. Plaintiff Jones was not available because, as defendants later learned, Jones was in jail for ten months.

Despite the absence of the plaintiffs, the defendants agreed to begin the mediation while being assured by plaintiff's counsel that he had full authority from his clients. However, the mediation reached impasse and ultimately was unsuccessful. Subsequently, defendants moved for sanctions against plaintiffs for failing to personally appear at the mediation as required by local rules and the Case Management Order previously entered in the cases. Defendants emphasized that the local rules allowed a party to petition the Presiding Judge seeking an excuse from personally appearing at the mediation. Neither plaintiff availed himself of this option and it was this point the court focused upon in assessing sanctions against plaintiffs. The court awarded attorney fees and expenses relating to defendants' preparation and attendance at the mediation. However, the court noted it had discretion to assess additional sanctions.

With respect to ADR before the US District Court for the Eastern District of Missouri, local rules allow the court to refer appropriate cases to mediation or early neutral evaluation and all named parties and the attorney primarily responsible for handling the trial of the matter are required to attend. Rule 16-602(B)(1&2) A required participant may petition the court no fewer than 15 days before the conference to be excused from the conference by a showing that personal attendance would impose an "extraordinary or otherwise unjustifiable hardship". Rule 16-602(B)(4) Additionally, if the parties agree that ADR has no reasonable chance of being productive, the parties may jointly move the court for an order vacating the ADR referral prior to selection of a neutral. Rule 16-602(A)(3)

May 2007

ARBITRATION UPDATE

By Robert Litz, Mediator, USA&M

The recent ruling in Sitelines, L.L.C. v. Pentstar Corporation, N2. ED88579, decided by the Missouri Court of Appeals on February 6, 2007 reinforces the requirement that a party to an arbitration agreement sued in Circuit Court, should raise the issue earlier rather than later in the litigation. In Sitelines, the defendant waited eight months to file a motion to dismiss, or in the alternative, to compel arbitration pursuant to an arbitration clause in the parties contract. The motion was faxed to the opposing counsel, along with a notice of hearing less than 24 hours before the hearing on plaintiff's motion for summary judgment. The trial court granted plaintiff's motion for summary judgment and entered a separate order denying the defendant's motion to dismiss or to compel arbitration. On appeal, the defendant asserted the trial judge erred in denying its motion to dismiss or, in the alternative to compel arbitration pursuant to the requirement of Section 4 of the Federal Arbitration Act, Title 9 U.S. Code, ("FAA"). While the Court of Appeals denied the appeal on procedural grounds relating to the limited notice given to plaintiff on the defendant's motion to dismiss/compel, the court discussed the interaction between the substantive law of the FAA and Missouri procedural law.

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The Court reiterated that the FAA creates substantive law which may be enforced in state courts and that state courts must apply federal law in cases in which the arbitration clause comes within the FAA. Sitelines at page 3. However, procedural provisions of the FAA are not binding on state courts as long as applicable state procedures do not defeat the rights granted by Congress. The delineation between procedural law and substantive law was set forth in Wilkes v. Missouri Highway & Transp. Comm'n, 762 S.W.2d 27 (Mo banc 1988) where the court stated:

> "Procedural law prescribes a method of enforcing rights or obtaining redress for their invasion; substantive law creates, defines and regulates rights; the distinction between substantive law and procedural law is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit." Wilkes, at 28, Sitelines, at 3.

Sitelines also noted that Missouri courts look to Missouri's version of the Uniform Arbitration Act, Sections 435.355 and 435.425 RSMo (2000), along with the Missouri Supreme Court Rules for the procedure to enforce the FAA in Missouri state courts. Section 435.425 and Rule 44.01(d) provide that a motion to dismiss/ compel arbitration shall be heard in a manner consistent with that used for the making and hearing of motions and upon five days notice, unless shorter notice is approved by the court. Finally, the court in Sitelines noted that Section 4 of the FAA requires five days written notice of an application for an order directing arbitration of the dispute.

The Sitelines case teaches us to follow the procedural rules in Missouri state courts, even if the FAA applies under the contract. A Best Practice suggestion is for a party that is sued that may be subject to an arbitration agreement to raise the issue at the earliest possible Moment. Otherwise, that party may risk the court holding the defendant waived its right to compel arbitration.

MAKE SURE YOUR MEDIATED SETTLEMENT IS ENFORCEABLE

By Ron Schowalter, Mediator, USA&M

A recent California Supreme Court case, *Fair v. Bakhtiari,* 2006 WL 3627208 (Cal. Sup. Ct. Dec. 14, 2006), demonstrates the risk of not making sure all your i's are dotted and your t's are crossed when you reduce your mediated settlement agreement to writing.

At the conclusion of a multi-day mediation, the parties and the mediator signed a memorandum entitled "Settlement Terms", which included the basic terms of the mediated settlement, including a provision to arbitrate all disputes. The parties also sent written notice to the court indicating that the case had been settled. Thereafter, the defendant rejected the "agreement", claiming there were still unresolved issues. The plaintiff then moved to compel arbitration as provided for in the memorandum. Defendant countered by claiming that the memorandum was covered by the rule of mediation confidentiality and, therefore, inadmissible.

Section 1123(b) of the California Evidence Code provides for an exception to the general rule of mediation confidentiality for such a memorandum if it "provides that it is enforceable or binding or words to that effect." The court held that to satisfy that requirement, words in a mediated agreement "must directly express the parties" agreement to be bound by the signed document. The court then held that the signed "Settlement Terms" didn't satisfy this standard, and refused to compel arbitration. The court admitted this exception may be unique to California and was stricter than the more flexible exception provided in the Uniform Mediation Act, i.e., "an agreement evidenced by a record signed by all parties to the agreement."

Actually, this requirement for more specificity may not be "unique" to California. See, *Haghighi v. Russian-American,* 173 F.3rd (8th Cir. 1999); 577 N.W.2d 927 (Minn.1998) citing Minnesota Statutes section 573.35, subd. 1: "A mediated settlement agreement is not binding unless it contains a provision stating that it is binding and a provision stating substantially that the parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights."

Missouri has not yet adopted the Uniform Mediation Act so it is unclear how a Missouri court might rule on this issue. The uncertainty is easily resolved, however, by counsel addressing the issue head on in the term sheet for the mediated settlement agreement. The USA&M template for mediated settlements contains the following language: "… any party may seek enforcement of this agreement. Further, that any party to this agreement and/or USA&M Midwest, Inc. may introduce this document into evidence without objection by any party notwithstanding the provisions of Missouri Supreme Court Rule 17, Section 435.014 R.S. Mo., and/or any other applicable state of federal statute or regulation.

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If the USA&M template is not going to be used, clearly it is advisable to include comparable language in your settlement memorandum. Finally, Missouri Supreme Court Rule 17.06(c) provides that "[s]ettlement shall be by written document setting out the essential terms of the agreement executed after (*emphasis added*) the termination of the alternative dispute resolution process." As an aside, Rule 17 governs court ordered mediations. Query, what requirements, if any, are there for a written document or for the timing of the agreement in a voluntary mediation? Nevertheless, the USA&M template also addresses these issues by including a statement:"…the parties acknowledge that prior to the execution of the agreement, the mediation was terminated…." Again, if the template is not being used it may be advisable for counsel to make sure that language to that effect is inserted in the settlement memorandum or that the mediator has officially declared that the mediation has been terminated before signing the mediated settlement agreement.

USA&M MIDWEST, INC. ANNOUNCES SENIOR ARBITRATOR PANEL

USA&M Midwest, Inc. is pleased to announce the formation of our "Senior Arbitration Panel". These arbitrators have extensive experience in areas ranging from real estate and construction disputes to professional malpractice, products liability, and automobile cases. Many of our expert arbitrators have also participated in complex litigation matters. Please visit our website at www.usam-midwest.com to view a brief biography for any of the arbitrators listed below.

Senior Arbitrators

Mr. William Billeaud
Hon. William Corrigan
Hon. Ellsworth Cundiff
Mr. George Fitzsimmons
Mr. Donald L. James
Mr. William James
Hon. Arthur Litz
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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.

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