Best Practice® Newsletter

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USA&M Midwest, Inc.

To Our Client

Welcome to the latest edition of our Best Practice® Newsletter. Ms. Kim L. Kirn has written another great article for this edition.

If you have not yet signed up for our September 28th Seminar "Current Issues in the Law & ADR" or our November 16th "Arbitrator Training", please contact Amy at (314) 231-4642 or astaten@usam-midwest.com.

Our first Illinois Best Practice® Seminar is now scheduled for December 7th at the Gateway Convention Center in Collinsville. Again, please contact Amy to register.

Finally, if you have not considered our new Small Claim or Worker's Compensation mediation programs, try it, you will like it. You can find information about these programs on our website at www.usam-midwest.com/medscwcmp.shtml.

Sincerely,

Michael Geigerman for the entire staff at USA&M Midwest, Inc.

MANDATORY MEDIATION FOR MALPRACTICE CASES IN MADISON COUNTY ILIINOIS

On June 18, 2007 the Madison County, Illinois Circuit Court adopted a mandatory mediation rule for all "healing arts" (medical) malpractice cases.

The Rule provides that "…All parties will be required to attend mediation, act in good faith, and have persons present with authority to negotiate and enter into settlement agreements."

A judge who has not been assigned as the trial judge for the case, "…who has been trained and certified as a mediator…" will mediate the case, "…unless all parties agree to select an alternative, compensated mediator…" The mediator must file a good faith compliance report.

BE CAREFUL WHAT YOU WISH FOR!
By Kim L. Kirn, Mediator, USA&M

In re Pisces Food, LLC, __SW3d__, 2007 WL 1518076 (Tex. App.-Austin), May 24, 2007

During my eleven years working as in-house counsel, I inserted mandatory mediation clauses into every contract I could. They were almost always accepted and luckily, no serious disputes ever arose under any of those contracts. However, in plenty of other disputes, mediation was neither requested or agreed to by the parties and I wished I would have had a prior agreement to mediate. The lesson of the *Pisces Food* case is to be careful what you wish for; later you may have to live by those clauses.

"...to be careful what you wish for..."

Defendant Pisces, otherwise known as Wendy's Restaurants, wisely used a mandatory mediation clause but in this case failed to follow it. Pisces required that all of its at-will employees agree to follow a four step dispute resolution program carefully set out in its "Speak Out Program Highlights" pamphlet. The steps were: "(1) talking about problems one-on-one with a store manager, (2) formal review by the corporate human resources department, (3) mediation, and (4) final and binding arbitration." The program was mandatory for claims pursued by both employees and Wendy's.

Plaintiff Carmen Jimenez worked at Pisces and was allegedly injured when a restaurant drawer fell on her. She sued her employer using a negligence theory. The opinion fails to explain why the workers compensation act did not preclude these claims, but then again, this is Texas! As expected, Defendant moved to compel arbitration. Both sides agreed that no mediation had occurred.

The trial court refused to compel arbitration and Defendant filed a writ of mandamus with the appellate court on this issue. The appellate court also refused to compel arbitration on the basis that Defendant had failed to meet its contractual preconditions for arbitration. In fact, Defendant never requested or participated in mediation with Plaintiff.

"...you must know your own policies and follow them."

The court zeroed in on the emphasis given in Defendant's pamphlet that the four steps must be followed in sequence and that only after steps 1, 2 and 3 fail, could a party request arbitration. The parties intended to make arbitration a dispute resolution mechanism of last resort. Therefore, the court sent the parties back to the trial court, but expressly made no ruling whether Defendant had waived its right to arbitrate by failing to request mediation first.

What should we take away from this case? Claimants and Respondents alike, you must know your own policies and follow them. If you agree to mandatory mediation clauses in your contracts, you must be sure to actually request (attempt) mediation before litigating or arbitrating. In a worst case scenario, if you fail to mediate first, you may lose your right to arbitrate.

ETHICS AND ADR

By Michael S. Geigerman

The Missouri Supreme Court adopted new rules regarding professional conduct that were effective July 1, 2007[1]. Three of the new Rules touch upon Alternative Dispute Resolution issues.

Rule 4-2(a) describes the role of the attorney/neutral (neutral).

> "A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter."[2]

Clarity in the role that the neutral is providing is the goal of Rule 4-2.4(b). Note, that the first sentence of the Rule is clearly limited to the situation where one or more of the participants are unrepresented, while the second sentence does not make such a distinction.

> "A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client."

Rule 4-1.12(a) precludes a neutral from representing parties in cases where s/he previously served as a neutral.[3] The new Rule reads in pertinent part:

> "(a) except as stated in Rule 4-1.12(d),[4] a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially … as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing."[5]

"...indicates the importance that the Supreme Court attaches to growing role of ADR."

Clearly, the adoption of these Rules indicates the importance that the Supreme Court attaches to growing role of ADR.[6]

[1]Missouri Supreme Court Rule 4...et. seq. The new Rules track the current ABA Model Rules of Professional Conduct.

[2]This Rule logically makes no distinction between the unrepresented or represented case. Supreme Court Rule 17.01 defines mediation and provides that "….A mediator may not impose his or her own judgment on the issues for that of the parties;…"

[3]*Matluck v. Matluck*, 825 So.2d 1071 (Fla. App., 2002);

[4]Rule 4-1.12(d) "An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party."

[5]The prohibition extends to the firm of the offending lawyer. See *Pappas v. Waggoner's Heating & Air, Inc.*, 2005 OK CIV APP 11 (OK 2/18/2005), 2005 OK CIV APP 11 (OK, 2005) for a discussion of this issue.

[6]The preamble to the Rules says "... a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter."

The Best Practice Series

UPCOMING FREE SEMINARS

November 16, 2007

"Arbitrator Training"

4.4 MCLE/3.7 IL CLE

A special 4 hour arbitrator training session intended to qualify attendees as Rule 17 Arbitrators.
Program will take place at Washington University School of Law, Anheuser-Busch Hall, Bryan Cave Moot Courtroom.
Doors open at 8:00 a.m., training begins at 8:30 a.m.

"What is Arbitration and How Does the Role of the Arbitrator Differ from the Role of a Judge"
Robert Hughes –*American Arbitration Association*

"Subjects for Pre-Hearing Conference"
James Keller –*Herzog Crebs*

"Conducting an Arbitration Hearing"
M. Susan Carlson –*Chackes Carlson Spritzer & Ghio*

"The Arbitration Agreement as the Basis for Jurisdiction"
"Ethical Consideration for Arbitrators"
Thomas Blumenthal –*Paule Camazine & Blumenthal*

"Rules and Pleadings"
"Specific Problems"
Robert Litz – *Carter Bauer Soule, LLC*

New!! Illinois Best Practice® Seminar

December 7, 2007

"Current Issues in Illinois Law"

3.6 MCLE/3.0 IL CLE

Program will take place at the Gateway Convention Center in Collinsville, Illinois.
Doors open at 8:00 a.m., seminar begins at 8:30 a.m.

"Medical Malpractice in Madison County"

"The Dirty Dozen Cases"

"Employment Law Update"

"Conflict Management within Law Firms"

"The State of the Judiciary!"
A candid discussion between the bar and the judiciary

Registration

Call Amy Staten at (314) 231-4642, fax (314) 231-0137
email astaten@usam-midwest.com or register online at www.usam-midwest.com/edurfs.shtml
Refreshments included. Enrollment is limited. Participation based on first-come first-serve.

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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.

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