"Ethical Issues in Construction and Alternative Dispute Resolution"

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by

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I. ETHICAL ISSUES IN CONSTRUCTION

A. Representing Multiple Parties in Construction Cases

Construction projects, given their complexity, generally involve many different parties performing many tasks at the same time or in sequence. Even a small residential construction job often will include an owner or owners, the contractor, one or more subcontractors (including those providing labor and materials), a lender, a surety for each of the contractors and subcontractors, an architect and an engineer.

To hold down costs, the parties are motivated to use few if any lawyers, and to have lawyers represent more than one, and sometimes even several, parties in the same project at the same time. Naturally, at first everyone is congenial, so it seems logical to the lawyer to comply with everyone's wishes.

It is at this beginning point when the lawyer needs to be particularly wary about representing more than one party at a time, even when the parties appear to be or claim to be "on the same side." For example, it seems logical that architects and engineers can be "lumped together" for they both perform the design services necessary to start the project. Often the same lawyer who represents one professional will also represent the other.

Missouri's Rules of Professional Conduct allow for an attorney in certain instances to represent more than one party. For example, Rule 4-1.7 provides that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's

responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected;

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

There are good reasons for this Rule and awful things can happen if the Rule is ignored or not followed to the letter. Experienced lawyers have seen too often the many problems that can ensue from the residential construction project, and the finger pointing that follows.

First, the project may be delayed. Then the wrong materials are used. The project becomes more costly due to design changes. The owners want their own changes, causing extra work and change orders. The bank needs money. The subcontractors are upset with directives from the general contractor. Worse yet, the project takes too long and the owners, husband and wife, decide to dissolve their marriage and they cannot agree on what to do with the half-finished house. These may seem to be far-fetched circumstances, but they are all-too-common in residential construction.

Unless the Rule has been carefully followed, the lawyer may be in trouble. Even when the Rule has been followed, the lawyer may find that the changes in circumstances renders it impossible for him or her to represent everyone previously being represented, and sometimes, the lawyer feels he or she no longer can represent anyone involved in the project.

Further, Missouri's Rule 4-1.8(g) of Professional Conduct provides the following when multiple parties are represented at the time of settlement:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

This Rule requires the lawyer to think in advance about where the project is headed and if a dispute is likely, how the lawyer can best represent more than one party at a time. Of course, 95 percent of all cases settle, so it is far more likely that the lawyer will have to face this Rule than it is she will be looking at a judge or jury during opening statement.

Law firms containing more than one lawyer also run the risk that different lawyers may wish to represent different parties in the same construction project. Lawyers need to be careful. The knowledge of one lawyer is "imputed" to all others in the same firm. Rule 4-1.10 requires that no lawyer in a firm may knowingly represent "a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8, 1.9 or 2.2."

B. Avoiding Liability to Non-Clients

As difficult as we lawyers sometimes find our clients, at least we know they are our clients. Attorney-client relationships are filled with healthy conflicts and mini "tugs-of-war" over strategy and direction. When difficulties arise with the client, the experienced lawyer usually can see it coming and engage in early resolution.

It is the person or company who comes from left field, claiming to be your client or more typically to have relied on the lawyer's representation or advice, that lawyers find much more troublesome. No

one I know has the sure-fire solution on how to avoid liability to non-clients, but some common guidelines will help to minimize the risks:

First, have an engagement letter in writing that spells out very clearly who is being represented. This seems so obvious, but it often is overlooked. If the owner is a company, determine if it is one company or more. Is it a joint venture? If so, dig deep enough to find out who are all the interested parties that comprise the ownership group, and determine if you represent each and all of them. If so, then obtain a signature on the engagement letter from each one.

Second, lawyers often represent a person in his or her individual capacity and then end up representing the company as well. Determine if you want to or are being asked to represent both, for a conflict over who you represent can arise when this is not clarified in the earliest instance. You may think you only represent one or the other, but the minority shareholder may have a different belief about who you represent.

Third, avoid making statements and representations to groups of persons and companies beyond those you represent. This is difficult to do sometimes, when a conflict arises, and there is a meeting amongst the players to sort out responsibility. Those at the meeting may seize upon your comments as being legal advice to them. Make a disclaimer that you only represent X and Y and that everyone else needs to seek separate legal counsel.

Contractors and subcontractors often have similar interests, particularly when it comes to getting paid. Be careful when you represent one to make clear that you do not represent the other.

Never sign a document as an attorney for someone you do not represent, even if it is merely a “casual document” and no apparent harm or misunderstanding seems likely. Remember, the test is not whether that person or company paid you for your advice.

C. Ethical Negotiation

It seems obvious that lawyers must always negotiate in an ethical manner. But when does this really mean? Sometimes negotiation is best served by delay in resolution so that other events can develop. Rule 4-3.2 requires that a "lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." What happens when the client's interests are to slow down the process, not speed it up for a prompt conclusion?

Clients sometimes demand that their lawyer huff and puff in negotiation, expecting their lawyer to threaten all manner of horrible events if the other side does not succumb to the client's demands and expectations. Yet these same clients have confided in you that they will settle at all costs. Rule 4-3.1 provides that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

This language essentially is the same as Rule 55.03 of the Missouri Rules of Civil Procedure, relating to a lawyer's good-faith representation about pleadings and other documents that are signed and filed with the court. Clearly, negotiation should not be treated with less regard for accuracy and truth than a pleading, yet lawyers frequently feel that oral negotiations enjoy a lower standard. Rule 4-3.1 makes clear that this should not be the case. Some may argue that this Rule only comes into play if there is a pending proceeding, but of course, the Rules should be read for their widest application when it comes to candor and honesty.

Rule 4-4.1 provides that a lawyer shall not knowingly "(a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." The Comments to the Rule, however, state that a "lawyer is required to be truthful when dealing with others on a

client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts."

Does this mean a lawyer can remain silent during negotiations when he or she knows the other side is not aware of important facts that would affect how a case should be evaluated? After all, negotiation does not mean doing opposing counsel's homework.

II. ALTERNATIVE DISPUTE RESOLUTION

A. Advantages and Disadvantages to ADR

First, the advantages to ADR, especially in a residential construction contract or dispute, are many and they far outweigh the disadvantages. Residential construction is tailor made for ADR. In fact, virtually all disputes over residential construction can be addressed by ADR. The advantages include:

1. Quicker resolution
2. Arbitrators are experienced in residential construction disputes
3. "Confidential" proceedings
4. Perhaps more limited discovery; thus, saving more money
5. Accountability of arbitrators
6. Picking the arbitrator
7. More relaxed rules of evidence (hearsay allowed)
8. More predictable results
9. More flexible awards
10. Arbitrators do not "split the baby"
11. Possible recovery of attorney fees
12. Parties have greater control over the process
13. Better conditions for the hearing (more relaxed, less formal)
14. Finality (very limited appeal rights)
15. Depending on the applicable, the arbitrators may be bound to reach a "just and equitable" result consistent with the parties' agreement

The disadvantages of ADR, or to say it another way, the advantages in a traditional court of law are:

1. Judges may be better equipped to decide purely legal issues
2. Pre trial motions more available
3. Virtually unlimited discovery, for those cases when discovery is critical
4. Parties can rely on legal precedent to guide them
5. Parties do not have to pay the arbitrators or the ADR forum for their fees and costs
6. Judges and juries must follow the law
7. Better use of subpoena power of courts around the country to at least compel attendance at a deposition for those witnesses who cannot attend trial

B. ADR Clauses in Contract Documents

ADR clauses now come in all sizes and shapes. Gone for the most part are the very simple contracts calling for binding arbitration and then leaving for later resolution all the details as to how the arbitration actually will take place. Of course, arbitration is a binding decision made by a neutral, unbiased arbitrator. That much seems obvious, and does not need express confirmation in writing into a written agreement.

What about everything else? Can the arbitration agreement cover the spectrum of possibilities and the unexpected as well? Within reason, the answer is yes.

Arbitration can only occur by specific agreement, either through a pre-dispute contract (typically in the original contract between the parties) or by consent (typically after the dispute unfolds). The following items should be considered when drafting or reviewing ADR provisions in a residential construction contract:

1. The parties must select a forum for resolution of their dispute. Among the choices are:

a. American Arbitration Association

b. U.S. Arbitration & Mediation

c. Pinnacle

d. Other professional groups

e. Private

2. A critical item to consider is the scope of dispute or potential dispute that the parties wish to be subject to the arbitration. The parties may decide that the agreement should be to arbitrate everything, no matter what is the dispute over the construction project. Or, they may want to limit the arbitration in one or more ways, such as:

a. Minimum or maximum dollar amount of dispute

b. Specific type of claims (fraud, tort, personal injury)

c. Claims involving non-parties to the arbitration agreement are excluded

d. Claims for emergency relief are excluded: TROs, injunctive relief.

3. Everyone should give thought to whether the agreement should include some provision on the applicable arbitration law that the parties wish to be in effect. Possible choices are:

a. To specify the law or leave silent

b. Federal law (Federal Arbitration Act, 9 U.S.C. §1-15)

c. Local law, such as Missouri Arbitration Act, Chapter 435 R.S.Mo. (modeled after the Uniform Arbitration Act)

d. If Missouri law applies (which it most likely will in Missouri residential construction contracts) the draftsman needs to place the following language adjacent to or above the space provided for signature, in ten-point capital letters:

"THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES."

4. Then consider the applicable substantive law that generally is included in most agreements. The choices include:

a. Federal

b. State

c. Silent (nothing is specified)

d. Declaration that the arbitrator does not have to follow any specific law

5. Everyone drafting an arbitration provision needs to consider whether the contract should include specific procedural rules on how the arbitration will take place. Items to consider are:

a. Incorporation of the rules of a specific forum, such as AAA

b. Incorporation of rules of civil Procedure of state or federal court

c. No rules (usually by being silent on this point

d. Rules other than those specified above

6. Perhaps the most important decision in an arbitration is the selection of the arbitrator. Just like no lawyer actually "picks a jury," arbitrators, while seemingly "selected" by the parties, typically are the product of elimination of potential arbitrators not acceptable to one of the parties, rather than the product of consensual choice and agreement. Even in those instances when the parties agree on an arbitrator and he or she is truly "selected," the parties' decision may be based more on culling out those rejected as unacceptable choices than on finding the one truly chosen by all concerned to be the anointed one. Regardless, the opportunity is there to truly play a key role in finding the right arbitrator for everyone involved. Qualifications of the arbitrator that should be considered are:

a. Specific industry experience or license, such as lawyer, P.E., architect

b. Number of years' experience

c. Geographic location of arbitrator

d. Nationality of arbitrator

7. Generally, the number of arbitrators is determined by the parties' agreement and their pre-determined choice on the financial threshold levels in moving from one to more than one arbitrator. The general choices in number of arbitrators are:

a. One

b. Three

c. If more than one, are any party appointed or are all of them truly independent

d. Two out of three is enough or is a unanimous decision necessary?

8. There are many methods of selecting an arbitrator and to the extent possible, the agreement should so specify the method, so as to avoid later disagreement and possible stalemate. Possible choices include:

a. Mutual agreement

b. Ranking by parties with strikes from a pool of potential arbitrators

c. Selection by court

d. Selection by forum

e. Selection by president of state or local bar associations

9. The location of the hearing is critical in many instances to a successful result, and certainly can aid in reducing costs and logistical considerations in having witnesses and other proof available on short notice at the hearing. All good advocates should request a specific location in the agreement where the arbitration will take place. Amazingly, many lawyers will not object, for they are focused on other

items in the agreement or do not try cases, so they view a venue provision to be unimportant or if important, it will be someone else's concern, at a later time. By contrast, others consider the hearing's location, much like the venue in a trial, to be the dominant factor in victory or defeat.

In reality, venue may be more important at a trial than at a hearing in arbitration. Arbitrators often travel from different states to hear cases, and they have a more national rather than local perspective, thus reducing the perception that the "locals" will win or the out-of-towners will be "home-towned." National arbitrators tend to be less focused on the place where the arbitration is occurring and more concentrated on deciding which party is entitled to a ruling in its favor. Regardless, location is still important and can be provided in the agreement as follows:

a. Specified in the agreement
b. Put into the demand for arbitration
c. Provided by default as the location of the project

10. Discovery can be spelled out in the agreement, but it often is not mentioned or it is not given sufficient thought by lawyers prior to execution to the arbitration agreement. Possible options to consider on whether to include discovery requirements in the agreement are:

a. None allowed
b. No provision made
c. As allowed by the Forum
d. As allowed by federal or state rules
e. Specific, defined discovery only (such as five depositions, 8 hours each)

11. It is vital that anyone drafting an arbitration agreement give considerable thought to who will be the parties to the arbitration agreement. This sounds so simple, yet when not followed, leads to so many problems. Possible parties to the agreement include:

a. Corporations

b. Individuals

c. Incorporation by reference from another contract

d. Third parties

e. Assigns, successors

12. An arbitration agreement can include specific requirements on pre-hearing motions. This is not a typical provision but under the right conditions, it may be a very important item to include in the agreement.

13. The time for the hearing is seldom set out in the agreement yet it should be by one or more of the parties to the agreement. Invariably, one side wants the hearing to take place tomorrow and the other side is content with sometime in the next decade. The agreement can provide that this decision is:

a. Left up to the arbitrators

b. Specified in the agreement

14. What evidence should the arbitrator consider in reaching his or her decision? Unlike a traditional court of law, where the rules of evidence and the practices of the judge will dictate what goes into evidence, the parties to an arbitration agreement can make their own binding decisions about what evidence will be received. The agreement may include:

a. No provision made

b. All evidence allowed under the federal and/or state rules of evidence

c. As allowed by the forum's rules, such as AAA

d. Limited as decided by the arbitrators

e. Use of subpoenas for evidence depositions of witnesses outside locale of hearing

f. Hearsay

g. Affidavits and declarations of witnesses

15. Although not typically an issue in Missouri residential construction disputes, some arbitration agreements spell out the language to be used at the hearing, such as:

a. English

b. Translators

16. The parties to the arbitration agreement should give consideration to the type of award they wish the arbitrator to render with his or her decision. There are several options from no explanation at all to a very detailed written opinion. Forms of the award can be:

a. Standard (no reasons are provided for in the decision)

b. Some reasoning provided in the written decision

c. Complete findings of fact and conclusions of law

17. The agreement may also provide the time within which the arbitrator must render the decision after the evidence has been presented. A typical time period is 30 days. In addition, some parties wish to limit the arbitrator's decision to preset ranges such as

a. Baseball (each side presents a number and the arbitrator must select one of the two numbers)

b. High-low agreement (the parties agree but do not tell the arbitrators that no matter what the decision it will fit within the parties' preset range).

18. The arbitration agreement should cover the powers of the arbitrators. Possible considerations of what powers the arbitrator may have are:

a. Same as judge

b. "Just and equitable" result, per AAA Rules

c. Specifically limit, such as no sanction power

d. Interim relief, such as an accounting, TRO or preliminary injunction

e. Specific performance

f. Other non-monetary relief

19. The agreement may contain limitations on what can and cannot be awarded. Some parties wish to limit the scope of the award in one or more of the following ways:

a. No punitive damages (except as allowed by statute)

b. No consequential damages

20. There are three ways that attorney fees can be awarded in an arbitration: They are:

a. By arbitration agreement

b. By statute

c. Request of all parties during arbitration

The parties should consider whether a specific provision should be included in the agreement to cover when and how the arbitrator can award attorney fees.

21. While typically not covered in the arbitration agreement, post-award relief is another consideration that parties should give after the award is rendered. Possible actions are:

a. Request to arbitrator for modification

b. Confirmation of Award in court per FAA, §9 or Chapter 435 R.S.Mo. (2000).

c. Convert award into judgment

22. An arbitration is not per se confidential, but the parties can make it confidential but incorporating such a provision into the agreement. Typically, the arbitrator is bound to confidentiality without the need for such a provision.

23. The parties may want to place a statute of limitations provision in the agreement.

C. Arbitration of Disputes

Arbitration is the "submission for determination of disputed matter to private unofficial persons selected in a manner provided by law or agreement." *Black's Law Dictionary*. This makes the arbitrator the decision maker who

must, without bias or compromise, reach a "just and equitable" result (under AAA's Rules) consistent with the parties' agreement.

Do the advantages of arbitration really yield a viable difference from traditional litigation? Let's consider two recent Missouri construction lawsuits tried in traditional courts and see if arbitration might have produced a different result; in other words, "what if."

"Just and Equitable" Result

Environmental Protection, Inspection and Consulting, Inc. v. City of Kansas City, Mo., 37 S.W.3d 360 (Mo. App. W.D. 2000).

EPIC agreed with the Kansas City Zoo to build a spillway for $400,000. An existing spillway had channeled water to Swope Park Lagoon. The new spillway was to divert water to the Blue River. The specifications called for building the new spillway without draining a lake that comprised part of the work site for the new spillway. The specifications required building a cofferdam, a temporary structure, to claim water and thus allow excavations for the spillway.

During construction, several problems developed, including a rainstorm flood of the new spillway, caused by a porous rock road submerged in the lake near the cofferdam. Engineers for the Kansas City Zoo knew of this submerged road, but neither the bid documents nor the contract referenced it.

EPIC sued the Kansas City Zoo alleging that non-disclosure of this rock road was a breach of contract; the jury agreed and awarded EPIC $561,200. It added $454,570 under Missouri's Prompt Payment Act for late payment of interest. The trial court took away the jury's award of interest and the appellate court upheld this decision.

Apparently, EPIC did not provide the documents required under the Act, including certificates of completion and contractor affidavits. Because of this, EPIC lost $454,570. Would arbitration yield a different result? Quite possibly yes, given the standard of "just and equitable."

Finality and Expense

Massman Construction Co. v. Missouri Highways & Transportation, 32 S.W.3d 109 (Mo. App. W.D. 2000).

The case chronicles a construction dispute in a Missouri court that required three trials, four appeals and took twelve years to resolve. Ultimately, the contractor "won" $850,000 for substructure work it did on the Highway 40 Bridge across the Missouri River near St. Charles and Chesterfield.

Since the late 1980s, Massman has been fighting the Commission over substructure work it did on the Highway 40 bridge across the Missouri River near St. Charles and Chesterfield.

The Missouri Court of Appeals for the Western District (located in Kansas City) agreed on August 29, 2000 that the trial court correctly entered a judgment in favor of Massman after a jury verdict for $850,000. Massman had sued the Commission for breach of warranty ex contractu.

This particular claim is brought against the government, such as the Highway Commission. Massman had to prove that the Commission made a false representation of material fact, that Massman did not know that it was false, that Massman relied on the representation and, as a direct result of such reliance, Massman incurred damage.

The case is a prime example of just how time-consuming, unpredictable and expensive construction litigation can be, not to mention the emotional toll on the parties.

The dispute began after Massman had submitted a bid to the Commission to do the bridge's substructure work on this high-profile project. When Massman prepared its bid, the Commission's plan did not show that there was a rock revetment in the river that may affect construction and thus, Massman's bid. A revetment typically is a built-up area of stone, concrete or similar material used to create an embankment.

Ironically, it was Massman that had built the revetment in question some ten years earlier. In fact, Massman had participated in more than 40 contracts

with the United States Army Corps of Engineers to build more than 2000 structures in the river, including revetments.

The evidence showed that Massman knew that the revetment was close to the bridge, but not that it necessarily would interfere with construction of a new bridge pier. Further, none of the Corps of Engineers' documents showed a conflict between the new bridge and the existing revetment.

The Commission offered contrary evidence, but as the appellate court noted, the jury was free to disregard such evidence and award a sizable verdict to Massman.

After the jury's verdict, the appellate court held that the trial court properly denied the Commission's post-jury motion for a judgment in its favor. The court noted that "reasonable minds could differ as to whether Massman knew that the revetment would interfere with the construction of Pier 6 of the bridge." Thus, Massman had enough evidence to merit letting the jury determine who should win.

The jury responded by awarding Massman $850,000. The $850,000 judgment differs greatly from the results in the prior trials. The first trial netted Massman a hefty $1,922,821.28. The second trial yielded far less, only $250,000. Each trial had a different jury.

While it is always difficult to compare jury verdicts, the first trial did not include evidence that Massman had put in the revetment. This evidence alone may explain the significant size of the first verdict compared to the next two trials.

After the first trial, the appeals court sent the case back to the trial court for a second trial. The appeals court believed that the jury needed to know about Massman's prior role in the revetment.

After the jury verdict in the second trial yielded only $250,000, the trial court agreed with Massman that the verdict was too small. The trial court declined Massman's request to increase the jury's award to $1,922,821.28. It did, however, order a new trial on the question of damages only.

The Commission appealed this decision. The Supreme Court then transferred the case to itself and reversed the trial court's decision to have a new trial only on damages. The Supreme Court ordered the trial court to enter a proper response to Massman's previous request to increase the verdict beyond $250,000.

The trial court obliged by tripling the judgment to $750,000. Then, administering what may have seemed like a form of Russian roulette, the trial court offered the Commission the option of accepting the new verdict of $750,000 or retrying the case but only on the issue of damages.

The Commission declined both options, and instead, asked the appellate court for help, once again. This time the appellate court instructed the trial court to offer the Commission the choice of accepting the $750,000 or retrying the case on all issues. The Commission chose a new trial on all issues.

The next trial produced the present judgment of $850,000. Obviously, the Commission would have been better off taking the offer of $750,000.

There is no way, however, that either party could have predicted this result. Would arbitration yield a different result? Maybe not, but arbitration would never take this long, cost this much, or require four appeals.

D. Mediation and Settlement

Mediation, almost without exception, is nonbonding and requires mutual agreement to settle. Mediation can occur by contract, consent or court order, such as pursuant to Rule 17 of the Missouri Rules of Civil Procedure, which provides in part: "counsel shall advise their clients of the availability of alternative dispute resolution programs." Rule 17(b).

1. Contract

An example of a general mediation provision is "The parties to this Contract agree to submit all disputes to nonbinding mediation with a mediator to be selected and agreed upon by all parties." The construction industry standard provision between owner and general contractor is Article 4.5, AIA Document A201-1997, General Conditions of the Contract for Construction. It provides:

4.5.1 Any Claim arising out of or related to the Contract, except Claims relating to aesthetic effect and except those waived as provided for in Subparagraphs 4.3.10, 9.10.4 and 9.10.5 shall, after initial decision by the Architect or 30 days after submission of the Claim to the Architect, be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party.

4.5.2 The parties shall endeavor to resolve their Claims by mediation which, unless the parties mutually agree otherwise, shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to the contract and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

4.5.3 The parties shall share the mediator's fees equally. The mediation shall be held in the place where the Project is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

2. Consent

Mediation is available at any point before or after a lawsuit is filed or a demand for arbitration is made. Consent is all that is required.

Since almost all cases settle, consent to mediate should be given early, even if the parties wish to delay the timing of the mediation. Asking to mediate is not a showing of weakness.

3. Court Order

Both the Federal and Missouri state courts encourage the parties to mediate shortly after the lawsuit is filed. The mediators come from a pool of certified mediators in federal court and approved mediators in state court, per the following:

i. Federal Court, Eastern District of Missouri, Local Rule 16-6.01 through 16-6.05

ii. Missouri Court, Supreme Court Rule 17 Alternative Dispute Resolution Program – Establishment Purpose – Definitions" . . .and "Counsel shall advise their clients of the availability of alternative dispute resolution programs." Rule 17.02(b).

Mediators are required to report to the court if the parties and counsel mediated "in good faith." Court sanctions can be imposed. Parties generally split equally the fees and the costs of the mediator.

4. Other Items to Consider

Counsel needs to take an active role in determining the timing of when to mediate. Sometimes discovery is needed before the mediation will be fruitful.

All mediations should be conducted pursuant to a written agreement between parties, counsel and the mediator to protect confidentiality. See §435.014, R.S.Mo., Supreme Court Rule 17, and Rule 408 of the Federal Rules of Civil Procedure.

Parties can designate in the agreement (i) a specific mediator and (ii) the level and type of experience required of the mediator and can select the type of mediator, such as facilitative, evaluative or transformative.