"Mediation Law Update"

a topic included in the seminar: "Mediation: A Valuable Tool for Litigation," sponsored by NBI Seminars on May 22, 2008

by

James R. Keller

Uniform Mediation Act

Ten states have adopted the Uniform Mediation Act since its inception in 2001. The most recent state is Idaho, where the governor signed the Uniform Mediation Act into law on February 26, 2008. The other nine states that have adopted the Act are Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington. The Uniform Mediation Act also is under consideration this year by the New York General Assembly.

Recent Cases in Missouri

There has been little reported appellate activity regarding mediation in the past year. There have been a couple cases, however, of interest as follows:

(1) Case Settled in Mediation but One Party Would Not Thereafter Execute a Settlement Agreement

In *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596 (Mo. 2007), a defendant nuclear fuel processing operator brought a motion in state court to enforce a settlement agreement that involved a plaintiff homeowners' tort action regarding allegations of groundwater contamination. The lawsuit started when the Eatons filed an action for property damage to their home that they allege was caused by groundwater made toxic by waste that was discharged by a nuclear fuel processing operation performed by the defendants. They refused to sign a proffered settlement agreement on the basis they had never authorized the settlement figure and that they had dismissed their attorney.

This prompted the defendants to file a motion to enforce the settlement agreement. The motion stated in part that the Eatons (the property owner

plaintiffs) and several others who had similar litigation against the defendants had participated in a mediation. The other parties (not the Eatons) settled their claims during mediation, but the Eatons did not settle. After the mediation concluded, the parties' counsel continued with discussions about possible settlement during the next several weeks. This resulted in the Eatons' attorney issuing a settlement demand to the defendants for $26,000 which the defendants accepted.

The balance of the Supreme Court's decision involves the three ways by which a trial court can determine procedurally how to handle a motion to enforce a settlement agreement. These ways are: (1) hold an evidentiary hearing, or (2) enter a judgment on the pleadings pursuant to Rule 55.27, or (3) enter summary judgment pursuant to Rule 74.04. The Supreme Court determined that the trial court erred in finding in defendant's favor without holding an evidentiary hearing. Thus, the court viewed as a question of fact the authority of the attorney to enter into the settlement.

Does this case teach us anything about what a mediator could have done or should have done or not done after the mediation concluded, which may have avoided this situation?

(2) Writ of Mandamus Stops Court-Ordered Mediation

In *SSM Health Care St. Louis, d/b/a St. Joseph Health Center v. Schneider*, 229 S.W.3d 279 (Mo. App. E.D. 2007), a hospital moved to dismiss a medical malpractice action on the basis that the plaintiff had failed to timely file a health care affidavit as required by §538.225.5 of the Revised Statutes of Missouri. The trial court denied the motion to dismiss and ordered the parties to mediate their dispute. Defendant filed a motion to reconsider, which was denied, and then sought a petition for a writ of mandamus. The appellate court decided to make absolute the preliminary order in mandamus. The trial court was then directed to enter an order dismissing plaintiff's cause of action without prejudice.

This case presents an interesting example of when a party can respond to a court-ordered mediation by filing what ultimately became a dispositive motion and thus there was no mediation.

Recent Developments in Georgia

Georgia Supreme Court Carves Exception in the General Rule that a Mediator Cannot be Compelled to Testify in Court About the Mediation

In *Wilson v. Wilson*, 282 Ga. 728, 653 S.E. 2d 702 (Ga. 2007), the Supreme Court of Georgia in a highly publicized decision recently held that if a party to a mediated settlement agreement contends in court that he or she was not competent to enter into a settlement agreement during the mediation, the mediator could testify at trial regarding the mental capacity of the parties to enter into the settlement agreement. In so ruling, the Supreme Court of Georgia created an exception to the cloak of confidentiality wherein a mediator does not divulge what happened during a mediation to any third party or to any court.

The Georgia Supreme Court referenced §6(b)(2) of the Uniform Mediation Act of 2001, which provides that when a party contends that a mediated settlement agreement is unenforceable, the mediator may testify regarding relevant mediation communications if a court determines that "the parties seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, [and] that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality." The court further noted that while neither the court nor the Georgia Commission on Dispute Resolution has yet adopted this exception in the context of the confidentiality of a court-referred mediation, fairness to the opposing party and the integrity of the mediation process dictated that the Supreme Court create an exception when a party contends in court that he or she was not competent to enter into and sign a settlement agreement that was the product of mediation. If a mediator were not allowed to testify under these circumstances, the court concluded that this would do "considerable harm not only to the court's mediation program but also to fundamental fairness." *Id*. at 733.

The Georgia Supreme Court also discussed that before a mediator is permitted to testify, the better practice is for the trial court to conduct an *in camera* hearing to address the need to call a mediator as a witness. This seems to comport with §6(b)(2) of the Uniform Mediation Act.

This decision prompted the Commission on Dispute Resolution and the State of Georgia to ask a committee to study the decision and determine whether Georgia Supreme Court's ADR rules need to be updated.