



JAMS BOSTON NEWSLETTER SUMMER 2018

A Note from the Editor

We have a lot to share in this issue of our Boston Newsletter. I am pleased to welcome two new neutrals to our esteemed panel: **Hon. Peter Lauriat (Ret.)** and **Conna Weiner, Esq.**, who are our featured Spotlight neutrals on pages 3-4.

We also have interesting articles by **Eric Van Loon, Esq.** and **Andrew Nadolna, Esq.**

Enjoy,

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10 Tips Toward Client Arbitration Satisfaction

By Eric E. Van Loon, Esq.



Except in “bet the company” circumstances, extensive discovery, dispositive motions, expert reports, and hearing costs are making courthouse litigation cost prohibitive. While arbitrations should bring quicker, cheaper, more thoughtful resolutions, some are as prolonged, expensive and unsatisfactory as the courthouse process they are supposed to improve. Wise arbitration choices can make a huge difference.

Here are 10 tips that can up the odds your clients will be happier after you arbitrate on their behalf.

- 1. Choose an arbitrator who’s efficient, as well as knowledgeable.** Prospective arbitrator interviews usually focus on subject matter experience. Make efficiency, a firm hand, and process streamlining techniques equally important in selecting your arbitrator.

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Mediating with Claims Professionals



By Andrew S. Nadolna, Esq.

Insurance has a pervasive presence in our court system. An insurance policy is a source of settlement funds for a wide variety of cases, from personal injury to employment to professional liability to pollution to cyber. If you need access to those funds to obtain a settlement in your case, you will need to negotiate with

an insurance claims professional. When negotiating with a claims professional, it helps to “speak their language.” Here are seven tips for ensuring a successful mediation when insurance is involved:

- 1. Use the pre-mediation process.** The pre-mediation call can be an effective way to get the insurer fully engaged before the mediation begins. Ask for the claims professional to be on the call when the mediation is being shaped in order to get an early view of what they may need to know to get ready. The call is an opportunity to find out if the claims professional intends to be present in person or be available by phone, or if they will just send a lawyer with authority. If it is a significant case, it never hurts to ask the claims professional to attend, even if their presence cannot be compelled. Not every case warrants travel and time away from a busy desk (they most likely have other files to handle), but for significant cases, this is a reasonable request.
- 2. Share submissions.** Make sure there are shared written submissions to the mediator and the submissions are exchanged well in advance of the mediation. Having shared submissions allows for a vigorous exchange of views before the mediation, and it will set the stage for a more in-depth dialogue when the parties get together. Even more importantly, if the submissions include new or revised information or arguments, the insurance professional will have time to incorporate this information into their request for authority on the case.

Insurance company claims departments are really litigation decision factories. All they do every day is figure out how and when and for what amount to settle cases. Prepare your case for them. Know the strengths and weaknesses.

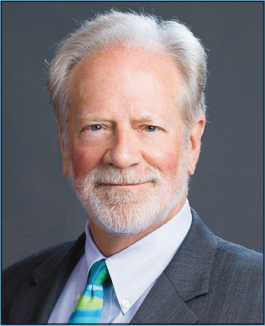
- 3. Learn whom you are dealing with.** The insurance industry is huge, and there are all sorts of people in it. At the beginning of your mediation, have the mediator find out who your insurance professional is. What kinds of claims do they ordinarily handle? How long have they been with the company? Do they manage other people? How often do they mediate? Understanding whom you are dealing with is crucial with respect to insurance claims professionals. If the mediator doesn't procure this information, talk to the person yourself.
- 4. Prepare.** Persuading an insurance company to pay is different from persuading a jury or judge to make an award. Insurance company claims departments are really litigation decision factories. All they do every day is figure out how and when and for what amount to settle cases. Prepare your case for them. Know the strengths and weaknesses. Compare your case to other cases with that company or other similar cases in that venue, but be prepared to have an argument about whether your examples are valid.
- 5. Engage in a professional way.** If your goal is to find out what the claims professional is willing to pay to settle the case, it is usually a bad idea to adopt a confrontational stance. Instead, make sure the claims professional is heard. What issues are they focused on in the case? What do they need to know? How can you provide them with a file that adequately supports the type of payment you hope to receive? In too many mediations, the lawyers and parties don't speak to the insurance representative. This is a mistake. Bring them into the process early and have the kind of discussion that a confidential mediation allows for. If you encounter resistance about the merits of the case, dig into the details. Don't just get frustrated and shut

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SPOTLIGHT ON...

Boston Neutral Hon. Peter M. Lauriat (Ret.)



Hon. Peter M. Lauriat (Ret.)

- *My grandfather, a passenger on the Lusitania when it was torpedoed and sunk in 1915, is featured in the book Dead Wake: The Last Crossing of the Lusitania, by Erik Larson.*
- *In 1986, I and seven others bought a minor league affiliate of the Boston Red Sox now known as the Lowell Spinners—from which 24+ players have become major leaguers.*
- *The black robe that I proudly wore in the Superior Court for the last 16 years was my niece's graduation robe from Wheaton College.*

Based in Boston and available nationwide

Judge Lauriat joins JAMS after serving on the Massachusetts Superior Court for 29 years, including two in the Business Litigation Session. Prior to his appointment to the bench, he practiced law in Boston for 17 years, specializing in civil litigation. Judge Lauriat earned a well-deserved reputation as a no-nonsense judge who was willing to roll up his sleeves in order to understand the complex legal issues, factual controversies and dynamics at play in each case.

What types of cases did you handle on the bench?

I was fortunate to preside over a wide variety of complex business and commercial cases, most notably several involving the effect of corporate governance on shareholder relationships and value. I gained a specialization in startup disputes, where I handled virtually all of the legal issues facing a startup closed corporation including venture capital, partnership agreements and trademark issues.

In addition I presided over and tried all manner of civil actions, from employment cases (including non-compete agreements); malpractice cases; breach of contract cases; personal injury and products liability cases to trade secret claims; construction cases; real estate disputes and insurance coverage claims. I specialized in civil discovery matters and co-authored a two-volume treatise on discovery.

What do attorneys have to say about your settlement skills?

I think they appreciate my knowledge of the law and ability to filter out the noise and hone in on what really matters during critical negotiations. I strive to be patient, open-minded and dedicated to resolving every case.

I think most would agree that I study and understand the legal issues, the factual controversies, and weigh them against all the dynamics at play. I speak frankly when I need to settle the hard-to-settle cases but my decisions were well-grounded, and focused on the practicalities of the dispute.

Tell us more about your legal career.

Prior to being appointed to the bench, I was a partner at Peabody & Brown (now Nixon Peabody) and an associate and partner at Herrick & Smith. I've taught at Harvard Law School, National Judicial College and taught numerous courses and programs for judges and lawyers in the Commonwealth and elsewhere. I am an author, editor and contributor to several books, including the *Massachusetts Jury Trial Benchbook*, Second (2004) and Third (2017) Editions; *Jury Trial Innovations in Massachusetts*; *Massachusetts Expert Witnesses*; and the *Massachusetts Deposition Practice Manual*.

What was your biggest influence for entering the law?

The reason I pursued the law was the advice and support of a Political Science Professor, R. Bruce Carroll, at Middlebury College, from which I graduated in 1968. He had organized a moot court as part of his Constitutional Law course during my junior year, and I was chosen to argue for the petitioner before a judge of the Superior Court in Middlebury. Although I was scared silly about doing so, I survived, and Professor Carroll not only encouraged me to consider law school, but urged me to apply to the University of Chicago, where he had been an undergraduate. I did, I somehow got in, and the rest is history.

SPOTLIGHT ON...

Boston Neutral Conna A. Weiner, Esq.



**Conna A.
Weiner, Esq.**

- *Lived and worked in Switzerland and has traveled extensively internationally for work and pleasure*
- *Was heading towards a career in modern dance before leaving New York University's School of the Arts, to attend Oberlin College, where she double majored in Government and Dance*
- *Doesn't mind assuming the risk of cooking things that she has never tried before for guests*

Available in Boston,
Washington D.C. and
nationwide

Ms. Weiner began her career as a litigator at Paul, Weiss, Rifkind, Wharton & Garrison in New York and then spent more than 20 years in-house fielding diverse, complex issues for multinational life sciences companies in the U.S. and abroad, including as a General Counsel. More recently, Ms. Weiner has developed an active ADR practice serving as an arbitrator and mediator on a number of well-known national and international provider panels, with a complex case specialization in biotech, life sciences (pharmaceuticals, devices, diagnostics), health care and other complex commercial and business matters.

How did your previous roles in-house help prepare you for a career in ADR?

In-house counsel must be able to master many areas of law and effectively communicate practical, realistic advice that fits in with their client's business objectives. In a mediation, these skills enable me to help parties conduct a simultaneous two-track analysis: a perceptive business negotiation and an evaluation of each side's chances should they end up in arbitration or litigation. In an arbitration setting, I have a visceral understanding of the need for companies to get back to business quickly and the concerns many inside counsel (and their outside counsel litigators) have about time and efficiency.

What practice areas are you particularly interested in developing at JAMS?

I have broad experience, but special expertise in the life sciences and health care fields. I have had the opportunity to explore the full range of unique legal issues facing innovation companies, including every phase of product research, development and commercialization. I have worked for branded and generic, human and animal pharmaceutical, vaccine and device manufacturers, all while collaborating extensively with their business partners. In health care cases, I think that parties see me as a neutral who is very knowledgeable about the health care environment but does not have the so-called "baggage" of having represented directly either payors or providers when I was an advocate.

What are your most successful traits as a mediator?

In addition to having a diverse transactional and litigation background, I emphasize the flexible, customizable nature of mediation. I try to help parties view it as a process consisting of several stages: depending on the matter, it could include information gathering/preparation and discussions with the mediator; in-person sessions involving active participation by key business people and their attorneys; and work in between or after sessions to draft documents or follow up if a complete settlement is not achieved. I am persistent and patient in connection with any follow up.

What are your most successful traits as an arbitrator?

I am responsive and engaged. I actively manage the process and am not afraid to take steps that may shorten the proceedings, such as consideration and granting of dispositive motions. I read all the papers and seek to develop an understanding of the key facts and law as early as possible so that I am prepared to hone in on the important issues. I work with the parties to shape an appropriate discovery plan. I am prepared to make clear, law-based decisions regarding who should prevail. I try to make sure that the parties understand my concerns with their positions as we go along so that they can address them through arguments and evidence rather than be shocked by the final, law-based award. Ultimately, it is important to give all sides a full and fair process while ensuring that proceedings do not go on longer than they should.

Mediating with Claims Professionals *continued from Page 3*

down. If you have points to make, make them calmly. Whether or not the case settles, you will have established a good relationship with the carrier, making future mediations run more smoothly.

- 6. Don't ask about authority.** Every claim department has delegated levels of standing authority (also called "desk authority") that are documented. These levels of authority are deemed critical controls by regulators and reinsurers. Companies could not function without them. Standing authority may not correspond to the amount that the person in the room is authorized to settle your case for. The representative may have more or less, depending on how the case was evaluated before mediation. The important point for adversaries and mediators is that claims professionals are usually looking for a discussion on the merits that leads to a decision about how much of their authority to

utilize to settle. They are trained negotiators. Telling you their number at the outset is a poor negotiating tactic, and the better negotiators will be offended that you asked.

- 7. Don't neglect the follow-up.** Many insurance professionals view mediation as one step in a resolution process that may have multiple steps. They often do not view the mediation as a must-settle moment. And they often go to mediations to test their views and learn more about the case. If the case does not settle at mediation, make sure the mediator follows up. Did they learn something? Do they need more information? Has their view changed? Many cases that don't settle at session often settle after a relatively brief period of follow-up.

Andrew S. Nadolna, Esq. is a JAMS neutral based in New York City. He was previously a senior claims executive at AIG for over 15 years and an insurance coverage attorney in private practice. He can be reached at anadolna@jamsadr.com.



JAMS Hosts Event for State of Massachusetts Asbestos Litigation

This Spring, JAMS Boston and Special Master Maria C. Walsh, Esq. hosted an event for State of Massachusetts Asbestos Litigation (SMAL). Joining her were JAMS neutral Hon. James Ryan (Ret.), Judge Heidi Brieger, Judge Charles Hely (Ret.), Defendants' Liaison Counsel Lawrence Cetrulo, plaintiffs' former and present Liaison Counsel David McMorris and Michael Shepard. At the event Special Master Maria Walsh recognized Rozanne Zinkowitz from JAMS for her tremendous case management of the docket for almost 15 years.

Clockwise from top photo:

Roxanne Zinkowitz, Maria C. Walsh, Esq., Hon. James V. Ryan (Ret.) and Lawrence Cetrulo, Esq.

Hon. Charles Hely (Ret.), Maria C. Walsh, Esq. and Judge Heidi Brieger

Plaintiff's Liaison Counsel Michael Shepard, Esq. and David McMorris, Esq. (who served as Plaintiff's Liaison Counsel from 1993-2017)



10 Tips Toward Client Arbitration Satisfaction *continued from Page 3*

2. Involve in-house counsel in the initial procedural hearing. It sets the tone, and often the parameters, for the rest of the arbitration. It gives the clients who foot the bill more effective participation in determining the balance between cost-effectiveness and a fully comprehensive process.

3. Limit discovery, especially depositions. Discovery is a major cost driver in arbitration. Both JAMS and AAA rules provide for limited depositions, yet parties often propose more. Selecting an arbitrator inclined toward efficiency and resistant even to joint proposals for more depositions provides some protection. Better yet, evaluate how to present your case through the fewest possible depositions. Then propose reasonable limits.

4. Limit, or eliminate, dispositive motions. Arbitration summary disposition motions are rarely granted; often key issues of material fact remain. Also, award vacature can result from failing to allow parties to present their cases. Nonetheless, dispositive motions are often offered. Efficiency-oriented arbitrators can require a letter requesting leave to file dispositive motions before allowing them. You can seize the initiative (and reduce client expense) by proposing a joint request to prohibit or limit dispositive motions.

5. Stipulate chronologies and undisputed facts. Much arbitration time is wasted establishing facts not in dispute. Attorneys can save client cost, time, and frustration by asking the arbitrator to require stipulations of the basic factual chronology and all facts not reasonably in dispute.

6. Limit admissibility challenges. Arbitrators weigh evidence wisely “for what it’s worth.” Typical courtroom objections and ruling on them prolong arbitration hearings unnecessarily. Efficiency-oriented arbitrators limit objections, keeping the focus on what is key to the merits. And limiting objections can help client hearing attendees feel their time better spent.

7. Consider presenting direct testimony in writing. Testimony (especially expert) submitted in advance is commonplace in Europe and international arbitration. While it can be important to introduce a witness and establish credibility, limiting direct testimony can shorten a hearing considerably and focus the arbitrator attention on what’s really in dispute.

8. Do not argue every contention. Creative minds conjure myriad contentions. While “throwing everything against the wall to see what sticks” might be tempting, weak arguments hurt you in the long run. If your arbitrator concludes you’ll argue any point, regardless of merit, you’ve squandered valuable credibility and face an uphill climb on issues that matter. Don’t waste time—and hurt your reputation—espousing long-shot positions.

9. Request a limited-length award. Consider in advance what your clients might require to understand why an award is entered against them. A joint request to limit the award to X pages can shorten arbitrator deliberation, reduce cost, and

bring a quicker result—while eliminating the arbitrator’s opportunity to author The Definitive Magnum Opus at your client’s expense.

10. Be vigilant in prevailing-party-attorney-fees circumstances. Prudence dictates arbitrating as if your client could be determined the NON-prevailing party. Although you may believe that “they will have to pay our expenses anyway,” this attitude can escalate costs and risks disastrous results and very unhappy clients.

Two possible reasons to disregard these suggestions are if your clients feel compelled to present the most-exhaustive case possible, or

if they require a definitive award to know that every argument was considered thoroughly.

Ultimately, clients have the right to decide whether these factors are more important to them than efficiency and cost savings. Yet, isn’t it wiser to present them with alternatives and have them make the decision?

Client post-arbitration satisfaction can come from many things. Undoubtedly, winning is one. Understanding the ruling (for better or worse) is another. Also, feeling that the process was business-like, cost-sensitive, efficient, and focused on the heart of the dispute can be major.

These suggestions can contribute to client satisfaction after your arbitration. And win or lose, client satisfaction is what builds your successful practice.

Eric Van Loon, Esq. is a JAMS neutral based in Boston. He was listed as the Best Lawyers 2015 “Boston Arbitrator of the Year.” He can be reached at evanloon@jamsadr.com.

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