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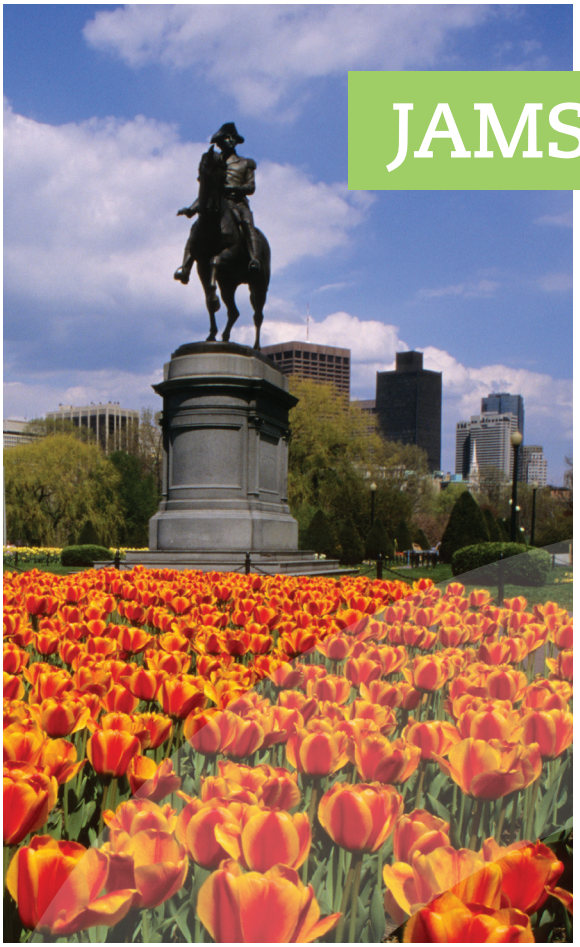
JAMS BOSTON NEWSLETTER



A Note from the Editor

Dear Colleagues and Friends,

We are pleased to share this edition of the JAMS Boston newsletter, where you will find practical ADR tools and updates as well as recent JAMS Boston developments. If you have any ideas for future articles, comments or questions about the newsletter or JAMS Boston specifically, please feel free to contact us.

Sincerely,

Jeffrey M. Poirier, Esq.
Business Manager
jpoirier@jamsadr.com or 617.228.9121

www.jamsadr.com/jams-boston

Early Mediation: A Magic Bullet?

By Hon. Paul E. Troy (Ret.)

More than 90 percent of the cases in Superior Court eventually settle before or during trial. In the majority, counsel are content to let discovery and dispositive motions play out; they do not focus on settlement until a trial date is imminent. But in some cases, a client may tell his or her counsel in confidence that he or she wants or needs an early resolution of the case. Clients have many reasons for wanting a speedy end to a lawsuit, such as the potential cost of the litigation, a possible merger or sale, bad publicity, business disruption and damage to commercial relationships.

When given this confidential instruction by the client, an attorney can bring about an early resolution of the case through mediation if the other side is already willing or if the attorney can convince opposing counsel to give it a try. Mediation is less costly and quicker than litigation, it is confidential and in the vast majority of cases it results in a settlement. It allows the parties to put the dispute behind them and to avoid an expensive and protracted trial. It may also minimize the anguish of an adverse outcome. As a bonus, even if mediation does not lead to a final resolution of the case, it offers perspective to both sides about the case and prepares them for trial. It may also lay the groundwork for a potential pretrial resolution of the case.

While California requires some Superior Court cases to be mediated at the parties' expense, that is not the rule here in Massachusetts. Although a Massachusetts Superior Court judge can order the parties to mediate before a volunteer or court-employed mediator, the Court cannot require them to mediate at their own expense. This would be deemed a violation of the parties' rights to full access to the courts under Article 11 of the Declaration of Rights of the Massachusetts Constitution. (See *Venturi v. Venturi*, 87 Mass. App. Ct. 190 (2015). See also the Uniform Rules on Dispute Resolution, SJC Rule 1:18.)

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WHAT'S INSIDE:

SPOTLIGHT ON. . .

JAMS Boston Neutral Thomas I. Elkind, Esq.

Thomas I. Elkind, Esq.

- *I started climbing mountains when I was a teenager and have never stopped. I climbed all 46 Adirondack peaks over 4,000 feet high, as well as the Matterhorn at 14,000 feet. I recently returned from a trek to Everest Base Camp in Nepal, where I hiked to over 17,000 feet.*
- *My wife and I have traveled extensively, visiting China, the Inca Trail to Machu Picchu in Peru and the Torres del Paine National Park in Patagonia.*

How did your years in private practice litigating construction disputes influence your decision to become a full-time mediator and arbitrator?

I learned very early in my career that judges hate trying construction cases because they take so long and involve so many facts. One federal judge even told the lawyers that he would never get to our case, so we should mediate it instead, and we did, successfully. I realized that he had done my client a favor, since the mediation was faster and cheaper than trying the case and the result left everyone more or less satisfied. That's when I decided to take the training to become certified as a mediator.

Can you give us a few highlights of your career to date, whether ADR or litigation?

I had a successful career as a litigator, with several of my case decisions making new law in the real estate/construction area. However, I have found it more satisfying to help parties find solutions to their disputes through mediation. Whenever one or both parties tell me that their dispute cannot be settled and they later reach a settlement, I feel better than winning in court.

What is the toughest construction dispute that you had to mediate/litigate?

It was probably my first construction case, involving 20 buildings comprising the first cooperative housing project built in Lincoln, Massachusetts. I was a junior associate and was given complete control over the case. My firm represented the owner/developer. Shortly after the project was completed, all 20 roofs began to leak. The contractor and the architect were sued, and the contractor's surety was also brought in. The case involved over 20 depositions and numerous motions, but it was eventually settled by the surety paying to repair the roofs.

How do you deal with difficult or challenging personalities in an ADR context?

I think the key to any successful mediation is for the mediator to show respect and understanding to all the parties. No matter how difficult one person may be, the mediator cannot let that affect the process. Most of these situations are caused by the parties' emotional venting about perceived wrongs that occurred in the past. My response is to try to focus the parties on their future interests rather than on whatever occurred in the past that brought them to this point.

How important is your community service to you, and how has it affected your life?

I have always felt that some kind of community service is an essential part of being a lawyer. My two major community service efforts have involved institutions that are very important to me and that I spend a lot of my leisure time enjoying: the West Suburban YMCA and the Newton Commonwealth Golf Course. Because no one on the YMCA board had any knowledge of construction, I was asked to join the board, and I became the head of the building committee.

PRACTICE PROFILE: Neutral Analysis

JAMS Neutral Analysis allows you to address key issues litigators encounter when analyzing approaches to resolution.

How does your case strategy appear to an experienced, neutral third party? Which claims or defenses are the weakest or strongest? How would a judge, jury or arbitrator respond to your witnesses and experts? What is the best way to present a dispositive motion? How will controlling legal precedents be applied? Should you consider settlement or proceed to a trial and/or an appeal? What are your chances at trial or on appeal?

JAMS Boston neutrals can provide you with confidential neutral evaluations on such questions, allowing you to fine-tune arguments, reassess settlement options, manage client expectations and ultimately proceed with heightened confidence and a winning strategy.

Non-Binding, Tailored Processes

JAMS Neutral Analysis refers to a range of non-binding processes in which one or more parties retain a neutral to deliver an evaluation, either in person or in writing, based on the merits of the case. Neutral Analysis typically involves review of factual and legal positions through briefs, oral arguments, mock exercises or an evaluation of what a likely jury outcome might be. These processes, which can be tailored to address the needs of virtually any type of case and utilized at any stage of litigation or arbitration, include the following:

- Pre-filing neutral evaluations
- Written case evaluations (brief-based)
- Evaluation of dispositive motions
- Mock opinion on motion to dismiss or summary judgment
- Mock arguments on motions or appeals, bench and jury trials and arbitrations

Please call JAMS Boston to learn more about how Neutral Analysis can help you.

"Engaging a third-party neutral evaluator, specifically an individual with significant experience adjudicating similar cases, offers many benefits to both defendants and plaintiffs. It provides an unbiased view of the strengths and weaknesses of a particular case, and an assessment of the possibility of success. In litigation, information is power, and early neutral evaluation provides exactly the information that parties need before embarking on a costly and time-consuming effort."

Click here to read more about *The Alternative Dispute Resolution Case Evaluator's Role in Contemplated and Pending Litigation* by JAMS neutral **Hon. Allan van Gestel (Ret.).**

CLE CORNER: Arbitration Clauses

JAMS Boston was proud to host the Northeast Chapter for the ACC this spring. *The program was well attended, and the reception that followed was a lively event. The* ***Hon. Stephen Neel (Ret.)*** *and* ***Hon. Margaret Hinkle (Ret.)*** *joined an impressive panel, presenting on "What In-House Counsel Need to Know about Arbitration Clauses."*

Complimentary CLE Programs: *JAMS is dedicated to staying active in the Boston and Massachusetts legal community by sponsoring bar associations, attending local events and providing continuing legal education courses. Our updated CLEs highlight different types of ADR formats and ethics in ADR. For more information about complimentary CLE programs delivered by our neutrals at our office or yours, please visit our CLE Menu.*

Early Mediation: A Magic Bullet?

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The option of mediation is formally raised for the first time in a Massachusetts Superior Court case at the final pretrial conference. Unfortunately, Superior Court Third Amended Standing Order I-88 provides that in an "average track" case, the final pretrial conference is not held for some two-and-a-half years after the case is originally filed. Concomitantly, attorneys' fees and costs steadily mount. Some judges are experimenting with having the parties called in to consider voluntary early mediation as soon as a case is filed. Initial reports indicate that this procedure is helping to reduce the backlog in those sessions. However, adding a mandate for an early additional hearing for each case is not on the horizon, given that Superior Court judges are already overwhelmed with the trials, hearings and decisions before them.

Here are some of the obstacles that might prevent an early mediation, as well as possible ways to overcome these obstacles when you are urged by your client to get the litigation resolved quickly.

1. Might a Request for Early Mediation Be Construed as Weakness?

Not anymore. This may have been an issue before mediation became prevalent, but now the requirement for attorneys to discuss potential mediation with their clients and each other is embedded in Rule 16, Mass. R. Civ. P., and specifically mandated in Appendix A (9) to Standing Order I-88, which requires that counsel include the following in their joint pre-trial memorandum:

> *"A certification that counsel for all parties have conferred and discussed the possibility of settlement, and the amenability of the case to mediation or other form of alternative dispute resolution...."*

Given the specific requirement of the court that all counsel discuss the amenability of the case to mediation, raising potential mediation with opposing counsel does not signal weakness.

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2. Opposing Counsel Is Too Busy to Even Consider Mediation.

There is no question that trial lawyers live exciting but often hectic and exhausting lives. They regularly juggle many cases and have pressing obligations, including upcoming motions, client demands and scheduled trials that may or may not go forward. Dealing with this obstacle is as simple as asking counsel when their schedule will slow down a bit. At that time, you can call to discuss potential mediation in your case either in a given month or at an time prior to trial, such as when interrogatories are first filed or when documents are produced. Do not hesitate to remind counsel that even if the mediation is unsuccessful, it will permit them to learn about your case and help prepare for trial.

3. The Insurance Company Has Insufficient Facts to Consider an Early Mediation.

If the claims adjuster for the insurance company feels your client's claim is completely meritless, you have a bigger problem on your hands than just arranging an early mediation. But even in a case that has obvious merit, an insurance company will ordinarily not agree to mediation for a case or offer serious money on a claim unless satisfied that it has the information and facts necessary to evaluate the claim. Issues beyond the claim's validity include its client's liability, potential comparative negligence and verification of the damages. To overcome this obstacle, ask the insurance company what information it needs and wants. Is it the depositions of key people? Is it business, financial, work, medical or other records, or releases signed by the client? Is it an itemized list of lost sales with explanations? If the insurance company will fairly consider an early mediation, it is in its interest to request this information. If nothing else, it will contribute to a more thorough evaluation of the case for both sides. And if the mediation is not successful, it is not binding, and the litigation can proceed. Even in cases without an insurance adjuster, lack of information may be an obstacle. In all cases, consider asking opposing counsel, "What information do you need to help you and your client participate in settlement talks through mediation?"

4. The Other Party Refuses to Mediate.

In some bitterly contested cases, it is not surprising to have opposing counsel tell you that his or her client adamantly refuses early mediation of the case. Both plaintiffs and defendants can get angry and hurt when they feel they were wronged by a defendant or unfairly sued by a plaintiff. Such a party's initial reaction is sometimes to use the litigation to "punish" the other side. This means that they will not agree to anything suggested by the other side, even if it might be helpful. As trial lawyers know, however, this anger usually dissipates as time passes, when legal bills keep arriving, the client is cross-examined for hours at a deposition and the litigation drags on. Although a party's anger can be an initial obstacle, raising the mediation proposal again after some time has passed may well be successful.

5. Opposing Counsel Will Not Even Discuss Mediation.

Sometimes, for whatever reason, and notwithstanding the clear intention of the court that parties consider mediation or some other form of alternative dispute resolution, opposing counsel may refuse to discuss it or otherwise cooperate in litigating the case. Mass. R. Civ. P. 16 (9) states that one of the purposes of a Rule 16 conference is to consider the possibility of settlement. Appendix A, Section F to Standing Order 1-88, provides that the parties may benefit from a Rule 16 conference to address various matters that may aid in resolving a case or reducing the time or expense of litigation. Section F goes on to state that any party may ask the Court for a Rule 16 conference and such requests will be honored if reasonable. When seeking an early mediation, your recourse may be to call the session clerk and ask that a Rule 16 conference be scheduled. Since clerks are invariably interested in reducing a session's caseload, it would not hurt to express your hope that the judge will encourage mediation during the conference.

In sum, don't give up too easily when your client wants or needs an expedited resolution of a lawsuit. Mediation is the key. Keep trying.

Hon. Paul E. Troy (Ret.) served as a widely respected Associate Justice of the Massachusetts Superior Court for 12 years before joining JAMS as a full-time mediator, arbitrator and neutral case evalutor. He can be reached at ptroy@jamsadr.com.