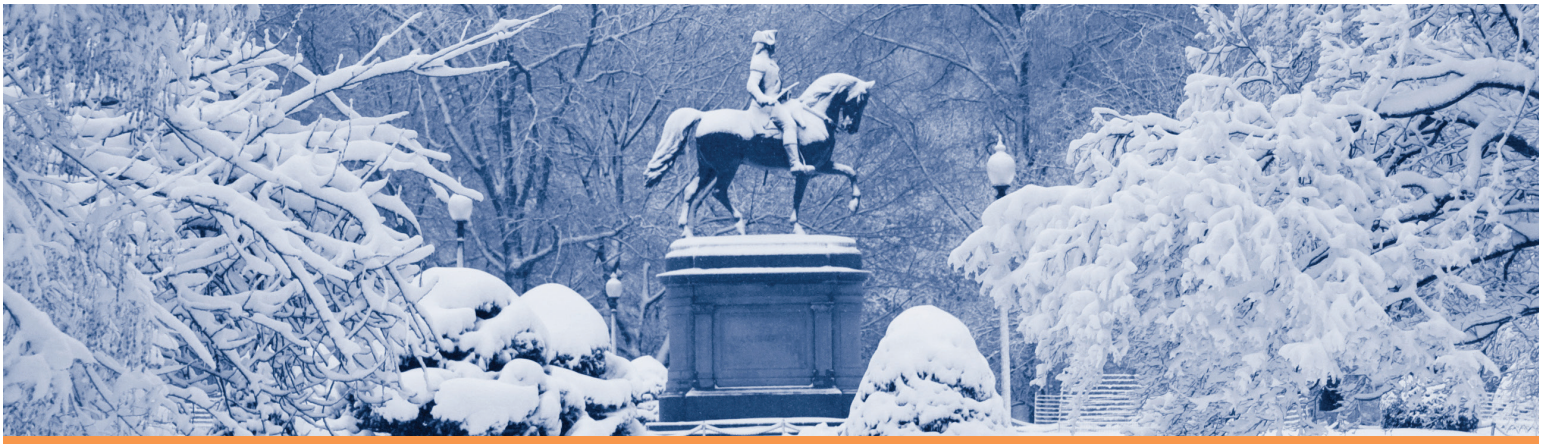

JAMS BOSTON NEWSLETTER WINTER 2017

A NOTE FROM THE EDITOR

Dear Colleagues and Friends,

We are pleased to share the inaugural edition of the JAMS Boston newsletter, where you will find practical ADR tools and updates as well as recent and upcoming JAMS developments.

If you have comments or questions about the newsletter or ideas for future articles, please feel free to contact me.

Sincerely,

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Top 5 Practical Pointers On Preparing for Mediation

By James E. McGuire, Esq.

A dispute is ready for mediation. The parties have agreed to mediate, you and opposing counsel have selected a mediator and agreed upon a time, date, and place. The client and your legal team have both asked: "What should we do to get ready for the mediation?" Here is a quick check-list to remind you of the steps you and your team will take to prepare for a successful mediation.

1. Review the case file.

Identify and review the key legal documents, business emails, legal pleadings and court rulings, if any. With input from the entire legal team (litigators and business lawyers), review the legal merits of claims and the settlement history. Review and update the case evaluation and the litigation budget.

2. Schedule a pre-mediation client meeting.

Review business objectives and brainstorm about different ways those objectives could be met. Discuss the mediation process, the role of the mediator, and your role as an advocate in the mediation process. Develop parameters for financial settlement and obtain necessary authority within

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WHAT'S INSIDE:

SPOTLIGHT ON. . .

JAMS Boston Neutral Judge Bonnie H. MacLeod

Hon. Bonnie H. MacLeod (Ret.)

- *Judge MacLeod has sung in St. Patrick's Cathedral in Ireland and on the Cliffs of Moher.*
- *Her 40+ page undergraduate thesis was written in French on a typewriter without foreign accent keys so she had to hand draw every accent mark.*
- *She has read every Robert B. Parker novel ever written.*

Why did you choose to join JAMS after stepping down from the bench?

In the year prior to my decision to retire, I gave a great deal of thought to "what next." I came to see ADR as an area where I could draw on the knowledge and experience acquired in my 44 years as a lawyer. I was acquainted with JAMS and became more acutely aware of its reputation as I saw some of my most distinguished Superior Court colleagues join JAMS after retirement.

What was the most interesting case you heard on the bench?

When I was appointed to the bench in 1989, I wrote on the front of my bench book, "The most important case you will hear is the one you are hearing right now." I hope that in my 27 years as a judge that daily reminder influenced the manner in which I listened to every case. It was an approach that kept me enthusiastic about, and fully engaged in, the work I did every single day.

What practice areas are you focusing on as a JAMS neutral?

Based on my experience presiding over the panoply of civil cases, I am focusing on all manner of personal injury cases, including death and catastrophic injuries, as well as disputes involving medical malpractice, product liability, construction, employment discrimination and sexual harassment. I'm also well-suited as a mediator in professional liability cases because I have more than 40 years of experience in legal ethics and taught professional responsibility at four different Boston law schools.

What advice would you give to lawyers preparing for a mediation with you?

Lawyers should approach mediation with the same degree of preparedness and thoroughness they would a trial. It's important that their client understands the less adversarial role of counsel in the mediation process, as well as the client's role in the mediation. Especially key is ensuring the attendance, or immediate availability, of the individual with authority to enter into a settlement agreement.

If you could meet and chat with any person throughout history, living or not, who would that be and why?

I would choose Jacqueline Bouvier Kennedy Onassis. I believe that she truly never revealed her complete self. Pictures of her indelibly etched on my memory are her as First Lady bringing elegance to the White House and opening its doors to the people; glimpses of her as a wife and mother at Hyannis Port and her leading the nation in mourning as she held the hands of her young children. I would tell her how much I admired her grace, her dignity and her discretion.

Keeping Current in Mediation and Arbitration Law

By Hon. John C. Cratsley (Ret.)

Among the issues in mediation and arbitration law which I am updating for my 2017 edition of an ADR practice guide, three stand out. First, new challenges to the enforceability of mediated agreements; second, adding non-signatories to an arbitration; and third, determining when a party's litigation activity acts as a waiver of its eventual arbitration claim.

Undoubtedly the most important legal area in mediation involves enforceability issues when one party claims a mediated settlement is unenforceable. Appellate decisions continue to reject attacks on enforceability as long as the basic elements of a mediated agreement exist. A recent example is *Beverly v. Abbot Labs,* 2016 WL 1042545 (7th Cir. 2016), in which the court held that the material terms in a handwritten mediation agreement governed (payment of a sum and dismissal) and that the other alleged material terms not in the handwritten agreement (indemnification, cooperation, and future employment) did not bar enforcement. See too, *Carlson v. Webb,* 87 Mass. App. Ct. 1128 (2015)(claimed changes to final document immaterial) and *2301 Cong. Realty, LLC v. Wise Bus. Forms, Inc.,* 2014 ME 147 (2014)("summary settlement agreement" enforced despite differences in the final mutual releases).

Undoubtedly the most important legal area in mediation involves enforceability issues when one party claims a mediated settlement is unenforceable.

In the field of arbitration, one area with different appellate opinions each year is that of waiver—when and by what type of litigation activity can a party waive their right to later claim a contractual right to arbitrate the dispute? Seemingly generous opinions rejecting waiver can be seen as the result of a judicial preference for arbitration by some judges, regardless of how late it is claimed in the court process. Further complicating the analysis of waiver is the requirement of some courts that the party claiming waiver establish proof of prejudice caused by the delay in filing the claim for contractually binding arbitration. Two recent appellate decisions do indicate, however, that facts about length and complexity of litigation are key to findings of prejudice to the party claiming waiver. In *El Paso Health Care Systems v. Green,* 2016 WL 787904 (Court of Appeals of Texas, 2016), the court found prejudice resulting from a delay of 18 months in litigation when the claim for arbitration was made in response to a motion to compel discovery that followed an extensive discovery plan and a set trial date. And in *Koehler v. The Packer Group,* 2016 IL Ap (1st) 142767, the Appellate Court of Illinois determined that the combination of four years in litigation, participation in limited discovery, and pleadings that omitted any asserted right to arbitration, all worked to bar the late motion to compel arbitration.

The ability of one party or the other to add a non-signatory to arbitration continues to puzzle the appellate courts. The apparently logical step of adding a party factually connected to the dispute but not named in the contractual arbitration provisions remains difficult due to conflicting interpretations of six legal considerations; incorporation by reference, assumption, agency, veil-piercing/alter ego, estoppel, and third-party beneficiary. Two decisions from the Massachusetts appellate courts illustrate this challenge. In *Walker v. Collyer,* 85 Mass. App. Ct. 311 (2014), the court discussed these factors but found none applicable and rejected the addition of a non-signatory doctor to the arbitration. But one year later the Supreme Judicial Court in *Machado v. Systems4 LLC,* 471 Mass. 204 (2015), focused on equitable estoppel and found that Machado's claims against Systems4 were inextricably intertwined and directly related to the franchise agreements containing the arbitration provision.

Each of these three areas of mediation and arbitration law, important for attorneys who want to give their clients the best advice, have the potential to change each year. This makes keeping current essential.

Hon. John C. Cratsley (Ret.) is a JAMS neutral based in Boston. He recently published an ADR Practice Guide for the state of Massachusetts, published by LexisNexis. He can be reached at jcratsley@jamsadr.com.

Top 5 Practical Pointers *Continued from Page 1*

those parameters. Develop multiple options for meeting business objectives, including non-economic settlement options. Have a candid discussion about litigation expenses, timelines, risks, and possible outcomes.

3. Develop a negotiation game plan.

a. Knowledge is power. Mediation is facilitated negotiation and you should plan accordingly. Information gathering and information sharing are critical aspects of an effective negotiation. Start with the basic questions: What do we know? What do we want to know? What do they need or want to know? What information are we willing to provide? When? Then develop a game plan first for an information exchange and then for the subsequent phases of the negotiation.

b. Interests over positions. If someone says, "We already know each other's positions, so let's skip the joint session," most probably that person has not given sufficient thought to the strategic aspects of information sharing. You know that "interests" matter much more than "positions." In most cases, each side is in the dark about the true interests of the other side. In some cases, one side may not even know the true interests of their own client. The joint session provides the best opportunity to articulate your interests and objectives. Don't waste it.

4. Assign roles to members of the mediation team.

Determine who should be present and why. The basic team will include key decision-makers and their attorneys. You will also consider whether employees with factual knowledge or retained experts should attend. For the first joint session, decide who will speak and what topics they will cover. Too frequently, attorneys treat mediation as a legal proceeding and assume that the attorney should be the primary (or even sole) speaker in the joint session. Framing the mediation as a facilitated negotiation, the joint session can be viewed as an important first step in a business negotiation. In many business mediations, the business representative is an experienced negotiator, whose background experience and expertise are significant (and under-utilized) assets. Consider using the business representative to share information about interests and objectives in the mediation. Doing so may well prompt the principals of the other party to start talking and to share information about their interests and objectives. Assign someone to be note-taker and one to be a people watcher. Preparation, practice, dress-rehearsals, or even a pre-mediation negotiation role-play will help your team develop an effective strategy for the mediation.

5. Plan for success.

Experienced mediation counsel plan for an information exchange prior to the mediation. A letter or a memo to the mediator, shared with the other side, will provide the background facts and documents and may include a brief discussion of the legal merits of the case. Counsel should consider a second confidential submission that includes the settlement history, interests and objectives, and any special challenges to achieving a settlement. A pre-mediation confidential telephone conversation with the mediator is also an efficient and effective way to share this information. Consider preparing a draft of a settlement agreement before the mediation. Doing so may help identify important topics to be added to your negotiation game plan. Bring your computer with a draft settlement agreement. Plan on ending the mediation day by signing a complete settlement agreement rather than a memorandum of understanding that leaves the drafting process to a later date. The latter approach inevitably leads to delay and may derail the deal. Proper preparation and planning will make your mediation a success. ■

James E. McGuire, Esq., a JAMS neutral in Boston, has extensive experience in all aspects of ADR and serves as a mediator, arbitrator, special master and neutral evaluator. He can be reached at jmcguire@jamsadr.com.

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 or contact John Carr at jcarr@jamsadr.com or 617.228.9128.

Congratulations: We congratulate JAMS neutrals **James McGuire, Esq., Hon. Stephen Neel (Ret.), Eric Van Loon, Esq.** and **Maria Walsh, Esq.** for being recognized as 2017 ***Best Lawyers in America***.