JAMS
WASHINGTON STATE NEWSLETTER
Winter '15-'16

## A Note From the Editor

**Dear Colleagues and Friends,**

We are pleased to share the winter edition of the JAMS Washington state newsletter, where you can read about recent and upcoming JAMS developments and learn practical tools and updates in the field of ADR. If you have any comments or questions about the newsletter or ideas for future articles, please feel free to contact me.

Sincerely,

Michelle Nemeth
Business Manager
206.292.0441
mnemeth@jamsadr.com

## Complimentary CLE Programs

JAMS is dedicated to staying involved in the Washington legal community by sponsoring bar associations, attending local events and providing continuing legal education courses. We have updated our CLE offerings to include practice-specific CLEs, programs about different types of ADR 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 Michelle Nemeth at **mnemeth@jamsadr.com** or 206.292.0441.

# Saving Litigation Costs by Early Mediation

By Larry Mills, Esq.

The Washington State Bar Association Task Force on the Escalating Costs of Civil Litigation has recently recommended early mediation (before completion of discovery) in superior court cases and certain other innovative mediation practices. The primary purposes of the Task Force recommendations are to reduce litigation costs and shorten the time to resolution of disputes. From a mediator's perspective, the recommendations are welcome and should be implemented. Let's look more closely at current mediation practices and the improvements suggested by the Task Force.

**Timing of Mediation.** Although studies have demonstrated early mediation reduces disposition time by months and litigation costs by thousands of dollars, in most litigated cases mediation is still scheduled late in the case, after discovery has been completed. The Task Force recommends (unless the court waives the requirement) the parties be required to mediate no later than 60 days after party depositions or 60 days before the start of trial, whichever is sooner.

In many cases it may be possible to mediate even sooner, particularly where counsel undertake early limited discovery focused on obtaining the information necessary to conduct a meaningful mediation. Early mediation can avoid the significant costs of extensive discovery, retention of experts, and trial preparation. Moreover, if the scope and conduct of discovery is itself contentious, the parties should consider appointing a mediator or special master to mediate or resolve discovery disputes expeditiously, thereby saving costs.

Continued on Page 2

# More Than "Checking the ADR Box"—Making Mediation Work

By Hon. Deborah Fleck (Ret.)

Mediation is the ADR vehicle most commonly used in personal injury cases. But it sometimes appears the attorneys are simply "checking the box"—attending mediation to comply with a court requirement before walking through the courthouse doors. Why? For plaintiffs, it may seem that the defendants don't come with reasonable settlement authority, making mediation a costly waste of time. For defendants, it may appear that the demand, coming late, does not allow sufficient time to review and value the case and perhaps set aside the necessary reserves. Attorneys are sometimes concerned that even suggesting mediation is a sign of weakness. Yet, properly structured, a mediated settlement can be a good resolution for both sides. What does it take? The keys to a successful personal injury mediation are participation in good faith, open communication and proper timing.

**Participation in Good Faith.** Although it seems axiomatic, for mediation to be successful, the parties must participate in a good faith effort to reach a compromise and fairly resolve the case. For plaintiffs, it takes a frank discussion between attorneys and their clients about the risks of trial and the downsides of their case. Defendants also need to focus on what is fair, as well as the opportunity costs and risks of taking the case to trial. Simply put, professional practice requires that to comply with ADR court rules,

Continued on Page 2

## Saving Litigation Costs Continued from Page 1

**Pre-Session Conferences.** Increasingly, cases are not settled on the day of the mediation, but are often settled within days or weeks thereafter with the assistance of persistent follow-up by the mediator. To maximize the chances of settlement on the day of mediation, the Task Force recommends pre-session conferences, in person or by telephone, between the mediator and counsel for each party, or with counsel and client together. Discussions with the mediator in these pre-session meetings or telephone calls are confidential communications under the Washington Mediation Act.

A skilled mediator can use the confidential pre-session conferences to assess the impediments to settlement, facilitate the expedited exchange of information relevant to settlement, ensure that the necessary persons with authority will be present at the mediation, and determine how the mediator can best facilitate a settlement. Many mediators already routinely contact counsel for each party after receiving the pre-mediation submissions and before the mediation session itself. The Task Force recommendation of pre-session conferences may encourage more lengthy and in-depth pre-session conversations that can influence the format of the mediation as well as increase the mediator's knowledge and credibility and the parties' trust in the mediator.

**Format of Mediation.** Most mediations in litigated cases in Washington are conducted in one day in the private caucus format with the parties and their counsel in separate rooms. The Task Force suggests parties and mediators consider varying the format of mediation depending upon the needs of the case and the disposition of the parties.

After pre-session conferences with each party, an experienced mediator can guide counsel and the parties in choosing an appropriate mediation format. For example, in a complex case it may be useful to schedule a series of mediation sessions rather than a one-day mediation. Although there is debate among professionals regarding the utility of an initial joint session, in some cases a joint session in which the parties see each other and communicate through counsel can aid in achieving a settlement.

As the mediation session proceeds, sometimes progress can be made in stalled negotiations by the mediator meeting with counsel without clients present or, more rarely and with the consent of the parties, clients meeting with each other with the mediator and without attorneys present. In short, creativity in designing the format of a mediation can enhance the chances of a mediated resolution.

The Task Force recommendations for earlier mediation, pre-session conferences with the mediator, and varying the format of the mediation process merit the support of counsel and mediators and can result in significant savings of litigation costs in Washington. ●

*JAMS is pleased to announce that Larry was named by Best Lawyers 2016 as Lawyer of the Year in Mediation in Seattle.*

## "Checking the ADR Box" Continued from Page 1

parties and their attorneys must attend with a commitment to participate in good faith, and not simply to "check the ADR box" on the case schedule.

**Open Communication (with the opposing party and mediator).** Prior to court rule requirements to participate in ADR and prior to modern technology, attorneys regularly communicated with one another by telephone and written proposals. This is still very good practice. Pick up the telephone and let opposing counsel know what you need. Defense attorneys benefit from receiving the plaintiff's proposal and legal analysis several weeks in advance, giving the carrier time to analyze the case. Plaintiffs' attorneys want to be sure that an adjuster will be present, or at the very least, available by telephone. Both sides need to know the relevant facts and have thoroughly researched and exchanged views on the legal issues, giving them the ability to assess the risk. Exchanging statements far in advance allows both sides to be prepared for a debate on opposing legal positions and avoids placing the settlement efforts on hold. Many mediators make a pre-mediation call, where the attorneys can provide information that is often helpful to the mediator in finessing trouble spots.

**Proper Timing.** If both sides have enough information regarding the facts and the law, the benefits of early, successful mediation include significant cost savings as well as the ability for clients to move on with their lives. With early resolution, the parties are less likely to have become entrenched in their positions. Mediation after summary judgment, where the "road map" for the trial is set, provides objective information that helps parties reach a realistic resolution.

Selecting the proper time for mediation can be a show of strength and a demonstration of professionalism rather than a sign of weakness. The groundwork can be set early on by working cooperatively through the discovery process and maintaining open communication by telephone, which often leads to professional collegiality and trust. While that relationship develops over a few months of a case, as well as the strength of adequate preparation, either side should be able to suggest engaging in earlier mediation for the benefit of all involved. ●

**Spotlight on JAMS Construction Defect Practice:** Achieving timely, cost-effective settlement of complex construction defect disputes through mediation requires a mediator with expertise, skill and experience in the mediation process, as well as in the construction industry. JAMS neutrals have a vast amount of experience resolving construction defect cases of all sizes, often involving multiple subcontractors as well as multiple insurers and insurance policies. Our mediators have the expertise, skill and experience that enables them, in confidential discussions with individual parties, to develop bases for settlement by assisting the parties as requested in their respective evaluations of critical factual and legal issues. In addition to our locally-based neutrals, several construction mediators are available to travel to the Seattle area to hear cases and often do not charge for their travel time. For more information about our Construction Defect neutrals available to hear cases in the Seattle area, please contact Michelle Nemeth at mnemeth@jamsadr.com or 206.292.0441.