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COMPLEX COMMERCIAL LITIGATION

PRACTICING IN THE PANDEMIC: UPDATE FROM THE COURTS

On Sept. 30, 2020, Complex Commercial Litigation Council Chair Derek Domian and Vice Chair Jessica Kelly Zoomed in with Judge Brian A. Davis of the Superior Court Business Litigation Session for an update on how the civil courts are running almost seven months into the COVID-19 pandemic. Judge Davis advised on the status of court procedures, his best practice tips for Zoom hearings and other interactions with the court, and the future outlook for jury trials in civil cases.

Below is a summary of the question-and-answer session with Judge Davis on practicing in the pandemic. Judge Davis made clear that, while judges must take direction and guidance from the Supreme Judicial Court (SJC) and the chief justices of their respective Trial Court departments, practices still vary to an extent among the various trial courts, and each judge may have unique procedures or rules for filings, scheduling, and conducting motions and other courtroom operations for his or her session. Judge Davis advises attorneys to check with the session clerk if there is any question about how the courtroom may be operating during COVID-19. Judge Davis also commended lawyers for their flexibility, creativity and cooperation as the profession adapts to a whole new way of practicing law and encourages the bar to make suggestions to the bench as to how changes to courtroom procedures and systems can help with this transition.

WHAT IS THE STATUS OF THE COURTS' CIVIL SESSIONS?

Effectively all civil sessions in the commonwealth are up and running, with most proceedings being conducted virtually. The District Court and Land Court have been running virtual jury-waived trials, with the Superior Court not far behind. Criminal cases will continue to receive priority for any in-person appearances. This will continue through 2020 and likely well into 2021.

Judge Davis has found that civil court proceedings are running relatively smoothly and that almost all proceedings can be conducted virtually, except jury trials. Both the bench and the bar have been quick to adapt to Zoom proceedings, and even events like emergency and *ex parte* motions are handled virtually. Judge Davis credits the accommodation and patience of counsel for contributing to the success of this transition.

While the SJC effectively extended all tracking order dates from the beginning of the pandemic until July 1, 2020, courts recognize how severely the pandemic has impacted the ability of attorneys to do their jobs and are open to requests to further enlarge discovery and other deadlines, where appropriate. Courts continue to address the backlog of cases that accumulated during the initial days of the pandemic, but are working hard to move cases along. With the exception of jury trials (addressed below), many sessions have little or no current backlog. Judge Davis expects discovery to proceed apace, with depositions having also made the relatively smooth transition to remote proceedings.

In many ways, virtual proceedings are easier to schedule and more cost-efficient for attorneys and their clients because they eliminate the need to travel. Some virtual proceedings, such as Rule 16 conferences, may continue to be conducted virtually even after the pandemic has passed.

That being said, Judge Davis believes that there is something lost when judges, attorneys and parties cannot interact in-person in a courtroom. He looks forward to the day when those interactions will become more commonplace.

WHAT ARE BEST PRACTICES FOR MOTION PRACTICE DURING THE PANDEMIC?

E-filing is slowly taking hold in the state courts. E-filing is now permitted or even required for selected cases types in the Housing Court, the District Court, the Boston Municipal Court, the Probate and Family Court, and the Superior courts in Barnstable, Middlesex, Suffolk and Worcester counties. The Trial Court was working on implementing a statewide e-filing system pre-COVID and that work continues, but full implementation will still take some time. If you have a question about e-filing in a particular case, it is always advisable to check with the clerk's office about the rules and procedures in that court.

Some judges may request or require electronic filings for convenience of the judge and clerks, who are likely working remotely on certain days. Judge Davis and many other Trial Court judges already are using pre-trial orders requiring electronic copies of exhibits for virtual hearings or jury-waived trials.

Judge Brian A. Davis of the Superior Court Business Litigation Session

Once a hearing is scheduled on a motion, the session clerk will likely email counsel with the Zoom information. Some judges will schedule a normal motion session, where all cases are invited to join the Zoom at 2 p.m. If there are numerous cases being called for the motion session, counsel may be put in the virtual waiting room or may be asked by the court to turn off their audio and video capabilities until their case is called. Some judges are scheduling motions for specific times so that there is only one case on the Zoom at a given time.

It is important to treat virtual hearings as you would an in-person hearing, including how you dress. Be prepared and do not interrupt opposing counsel or the judge. Make sure you have a strong internet connection and are in a quiet place where you can minimize interruptions. All that being said, the courts recognize that many attorneys continue to work from home, and that environment — especially in homes with children — cannot always be completely controlled. While not necessarily recommended, the appearance of a wandering 3-year-old during a virtual hearing is unlikely to result in sanctions.

Judge Davis has not made a policy of deciding more motions on the papers, but may be more inclined to do so in appropriate proceedings. While resolving the backlog of motion hearings in some sessions is an ongoing task, the decision time after a hearing has not been dramatically affected by the move to virtual motion hearings.

The courts are rolling out new computers and other technology that will assist judges, clerks and staff in conducting remote pro-

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ceedings, but that, too, will take time. The email system that the Trial Court currently utilizes generally cannot accept large file attachments (those bigger than 7 megabytes), so other methods of delivering electronic files should be considered, such as ShareFile and Dropbox. Some judges may also allow password-protected thumb drives to be submitted by counsel, but courts are generally discouraging their use because of security concerns (e.g., thumb drives carrying a computer virus). Counsel is also urged to use particular caution when electronically sharing documents that contain confidential or sensitive information.

More information on conducting remote proceedings in the courts is available online at https://www.mass.gov/info-details/remotevirtual-court-services#superior-court-protocols-and-tips-for-remote-hearings. More information on best practices for Zoom hearings is available online at https://www.mass.gov/info-details/virtual-meeting-best-practices.

HOW ARE COURTS HANDLING EMERGENCY MOTIONS?

Courts are conducting civil *ex parte* and emergency hearings per the usual course, except that the hearings are over Zoom. Counsel should file papers as they normally would and contact the session clerk about scheduling a hearing. Each week, a judge is assigned to handle emergency civil matters, so it is possible to get a same-day hearing in appropriate circumstances.

ARE COURTS CONDUCTING EVIDENTIARY HEARINGS OVER ZOOM?

Yes they are. Many courts are conducting evidentiary hearings and jury-waived trials over Zoom. To assist this process, the Trial Court recently created a special committee that has prepared a "Procedural Guide to Managing Evidence in Virtual Proceedings." The Guide offers useful suggestions and guidelines to litigants, attorneys, judges and other court personnel regarding the preparation and submission, presentation, and retention of physical and electronic evidence in virtual, non-jury court proceedings. The first edition of the Guide currently is being reviewed and piloted in select sessions in the various Trial Court departments. Judge Davis expects that, if all goes well, the finalized Guide will be publicly disseminated early in 2021.

Judge Davis pointed out that the new Mass. Guide to Evidence Section 1119, adopted in August 2020, also is worth reviewing prior to participating in a virtual hearing. Section 1119 provides, in part, that judges cannot refuse to consider digital evidence simply because it is contained on a personal electronic device.

Judge Davis believes that the best practice for introducing exhibits for evidentiary hearings is for counsel to identify all exhibits (both agreed-upon and contested) ahead of time, then make sure each party, each witness and the judge have a hard copy of the exhibits with them during the Zoom proceedings. Counsel should pre-mark agreed-upon exhibits with numbers and disputed exhibits with letters. Counsel can then ask the witness to confirm verbally that he or she is looking at the correct document. The submission and use of exhibits at trial are covered by Judge Davis' pre-trial order. Counsel can expect such pre-trial orders to detail exactly how Zoom can — and cannot — be used during the conduct of trials. For example, instead of standing, counsel making objections are instructed to raise a "virtual hand" on Zoom.

Some litigants choose to use the "screen share" capability on Zoom or to put links to exhibits in the chat room, especially for impeachment purposes (e.g., counsel does not want the witness to see a document prior to showing it to him or her). For non-impeachment evidence, however, it is better practice for counsel to have hard copies distributed to all parties to the proceeding ahead of time.

Keep in mind that Zoom hearings must, whenever possible, be recorded on the courts' FTR system, not on Zoom. Therefore, absent special permission, there is no video recording of the Zoom hearing.

WHEN WILL TRIALS RESUME?

The answer is, it depends.

The Land Court and the District Court have been conducting virtual, jury-waived trials for several months. The Superior Court is also starting to ramp up jury-waived trials. Judge Davis currently has five scheduled in BLS-1 before the end of 2020. Litigants should make sure they are aware of and follow court- and judge-specific pre-trial orders for virtual bench trials, which should help guide counsel and parties on how to prepare for and conduct the proceedings.

On Sept. 17, 2020, the SJC issued an updated order concerning the gradual resumption of jury trials. Phase 1 will include a limited number of in-person jury trials that will be in a select number of locations, with only one trial at a time conducted in each location. The target date for the commencement of Phase 1 jury trials has been extended to Jan. 11, 2021, but that date may be further extended if the current COVID-19 resurgence continues. Civil juries will be limited to six jurors, and counsel will have a limited number of peremptory challenges. Potential jurors will be excused if they are at high risk for a severe COVID-19 infection. Although some civil trials may take place, most jury trials conducted during Phase 1 will be focused on criminal cases. It is anticipated that Phase 2, which would involve a wider resumption of jury trials, will begin some months later, depending on the SJC's assessment of the results of Phase 1 and the then-current COVID-19 transmission rate.

It is unclear when civil jury trials will resume in significant numbers and how they will look once they do resume. Smaller juries and fewer peremptory challenges are changes that may remain in place for some time. Judge Davis has seen more civil litigants requesting jury-waived trials in an effort to move their cases along. Not all litigants, however, wish to proceed jury-waived. As a result, the BLS currently is scheduling jury trials in 2021, with the caution that they may not happen on schedule due to the future state of the pandemic.

WHAT ARE THE OPTIONS FOR VIRTUAL ADR?

Alternative dispute resolution is alive and well in Massachusetts. Mediations are happening at least as much as, if not more than, before COVID. More litigants may be turning to ADR in the future given the uncertainty of civil jury trials.

Judge Davis recommends that counsel review Superior Court Rule 20 on individual case management and tracking, which offers some low-cost and creative ways litigants may try to resolve their cases in Superior Court, or at least move them toward resolution more quickly. One example is the opportunity for a judge (from a different session) to give a non-binding assessment of the case.

CONCLUDING THOUGHTS

Almost all court business for civil proceedings can be conducted virtually, except for jury trials. The courts are working hard to catch up from the shutdown and continue to move cases along. The courts are grateful to litigants and the bar for their contin-

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CRIMINAL JUSTICE

PRACTICE TIP 101: AVOIDING OFFENSIVE LANGUAGE WHEN TALKING ABOUT CRIMINAL MATTERS

BY PAULINE QUIRION

While we cannot always guarantee positive outcomes in our representation of clients, we do have control over our relationships to the extent that we treat people with respect and try to ensure that their experience with us is positive. Words can be hurtful and perpetuate negative stereotypes regardless of our intentions. By using more people-centered language and avoiding negative or judgmental terminology, we can avoid alienating and offending clients with criminal cases as well as their families and the communities we serve.

REPLACING NEGATIVE TERMINOLOGY WITH MORE AFFIRMATIVE LANGUAGE

Offensive terminology. Avoid use of words such as offender, ex-offender, convict, felon, ex-felon, juvenile delinquent or convicted criminal.

People-centric language.[1] Examples of alternative phrases include: people who are or were incarcerated; person in prison, jail or custody; person with a criminal case to be sealed or expunged; person with a past conviction or juvenile adjudication; or person with a pending criminal or juvenile case. Some clients and advocates think the term "inmate" is similarly dehumanizing, so it is best to also avoid this term in your advocacy for a person who is incarcerated.

Why make a change? Negative idioms stigmatize people without acknowledging their full identities or the possibility for individual growth and future success. People-centric language does not equate individuals with their criminal charges, case dispositions or confinement status. The stigma of a criminal record is so severe that individuals with past criminal cases often must engage in Herculean efforts to obtain employment, housing and financial stability. Using language that clients and others consider derogatory can lead to uncomfortable interactions and perpetuates negative stereotypes that impede opportunities for second chances. There also is no evidence that perpetual shaming reduces crime or recidivism.

Words such as "offender" also presume either actual guilt or a finding of guilt, which may not be accurate. While some individuals are convicted of an offense or incarcerated, many people have cases that did not end in convictions or sentences to jail or prison.

CHANGING OTHER OFFENSIVE TERMINOLOGY

Some individuals who are charged with criminal offenses may be struggling with substance use disorders, or they may be immigrants. Lawyers as well as the general public may use similar negative jargon to refer to such individuals.

Offensive terminology. Avoid use of negative words such as addict, junkie, or drug and alcohol abuser. Many experts indicate that this type of stigmatizing language may also discourage people from seeking treatment.[2]

People-centric language. Instead, say client or person with a substance use disorder.

Offensive terminology. Avoid referring to people who are immigrants as illegal or illegals.

People-centric language. Instead, say that the person is undocumented or not a citizen. Use of the term "illegal" is also not accurate because, although a person may not have lawful immigration status, a person cannot be "illegal." Many immigrants, while not yet U.S. citizens or lawful permanent residents, also may have lawful immigrant status.

CONCLUSION

Our words have power and matter. We should challenge old practices that define people solely based on their past criminal cases and foreclose the possibility of positive change and future success. Use of negative labels for individuals who are prosecuted or incarcerated is common in the legal profession, publications, and in American culture. People-centric language avoids the promotion of stereotypes, racial bias, and barriers to opportunity that are especially harmful to Black and Latinx communities already disproportionately affected by the criminal legal system and mass incarceration.[3] ■

PAULINE QUIRION is the director of the CORI & Re-entry Project at Greater Boston Legal Services. She previously served as co-chair of the Massachusetts Bar Association Criminal Justice Reform Working Group and is a member of the Criminal Justice Section Council.

1. *See* "Council of State Governments staff, Reporting and Criminal Records: Three Tips for Journalists," Clean Slate Clearinghouse (Oct. 2, 2018), https://cleanslateclearinghouse.org/news/reporting-and-criminal-records-three-tips-for-journalists/.
2. Ruben Castenda, "Is Calling Someone Addicted to Drugs or Alcohol a Substance 'Abuser' Harmful? The Language of Addiction and Recovery is Evolving," U.S. News and World Report (June 12, 2017), https://health.usnews.com/wellness/articles/2017-06-12/is-calling-someone-addicted-to-drugs-or-alcohol-a-substance-abuser-harmful.
3. *See* Elizabeth Tsai Bishop, et al., Criminal Justice Policy Program, Harvard Law School, "Racial Disparities in the Massachusetts Criminal System," A Report by the Criminal Justice Policy Program, Harvard Law School, 1-4 (September 2020), http://cjpp.law.harvard.edu/publications/racial-disparities-in-the-massachusetts-criminal-system.

HOW TO SUBMIT ARTICLES

To inquire about submitting an article to *SECTION REVIEW*, contact Kelsey Sadoff (KSadoff@MassBar.org).

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ued patience and flexibility as they navigate the pandemic with skeleton staffs and remote proceedings. If you are wondering about the status of a case or waiting for something to be scheduled, do not hesitate to reach out to the session clerks for an update or guidance. ■

DISPUTE RESOLUTION IN A TIME OF COVID-19 AND BEYOND: FIVE TIPS FOR TRANSFORMING A LITIGATED CASE TO SETTLEMENT

BY JUSTIN L. KELSEY AND BETH L. AARONS

Seeking and obtaining the assistance of the courts in resolving disputes is a right afforded to the residents of our commonwealth, but it is not always administered justly, equally or swiftly. Many have had these rights denied or delayed over the years due to discrimination, economic limitations, or merely the backlog of cases funneling through a now heavily overburdened and understaffed court system.

> "We must come to see with the distinguished jurist of yesterday that **'justice too long delayed is justice denied.'"**
>
> *— from the Letter from Birmingham Jail by Martin Luther King Jr.*

The COVID-19 crisis has highlighted just how necessary court access is in emergencies, and also how significantly delayed access to the courts can be for non-emergency matters. Unfortunately, it is a very high bar for a case to constitute an emergency, which means clients are bearing the stress and trauma of ongoing litigation for much longer than even the normal lengthy process. Now more than ever is the time to consider alternatives.

Unless there are specific reasons making litigation necessary, such as preserving statutes of limitation, or laying the groundwork for an appeal or a legal issue of first impression, most civil legal disputes can be resolved through a dispute resolution process outside of court. Even if litigation has already been initiated, it can usually be temporarily suspended while the parties try to resolve their issue outside of court without waiving their rights to continue in litigation if a full settlement is not reached.

There are many different options for dispute resolution processes. Some of the most common processes include mediation, the collaborative law process, negotiated settlement, conciliation and arbitration. These processes require varying degrees of direct communication between clients (this list is roughly from most to least client participation), so even highly contentious parties can choose a process that suits their comfort level of communication and participation.

Here are some initial steps you could take to transform a litigated case to a path toward resolution:

1. DO A PROCESS ASSESSMENT WITH YOUR CLIENT

How is litigation working or not working for your client during COVID? Have hearings and trial dates been postponed? Is there continuing conflict between the parties while waiting in litigation limbo? Maybe it is time for a conversation with the client about other options that could lead to resolution sooner, given the significant court delays everyone is experiencing. See if your client might be open to exploring dispute resolution options. The client would have the option of keeping their litigation placeholder while trying a dispute resolution process.

2. ASK DISPUTE RESOLUTION PROFESSIONALS FOR INFORMATION AND PROCESS RECOMMENDATIONS

If you're not sure you know all the ins and outs of the various dispute resolution processes, reach out to a dispute resolution practitioner for guidance. Mediators, collaborative law practitioners, conciliators and arbitrators explain their services every day, and are usually well-versed in the pros, cons and differences between dispute resolution processes since they are often in the position of helping potential clients choose a process. There is really nothing to lose by investigating dispute resolution options to see if any might be a good fit for your client.

3. CREATE A TEMPLATE FOR REQUESTING DISPUTE RESOLUTION

For most practice areas, there is some point in your practice where dispute resolution could be a viable option to offer. In family law, the authors' primary practice, dispute resolution options can be brought in at many different points in the process. If there is a typical time when you might consider introducing dispute resolution options in your practice area, then create a template letter to invite the other party to a dispute resolution process, including a description of the process your client would like to try. If you're not sure how best to do this, then run your draft template by a dispute resolution professional to help you make a persuasive invitation.

4. TAKE A DISPUTE RESOLUTION TRAINING

Even if you never intend to become a mediator, collaborative law practitioner, conciliator or arbitrator, you will be a better advocate when representing clients in these settings if you more fully understand these processes and the training the professionals received. You will also become more skilled at identifying what processes could be a good fit for prospective and existing clients. Additionally, dispute resolution practitioners are more likely to refer representation work to attorneys whom they know have also been trained in these processes and who become "mediation friendly attorneys," meaning attorneys who respect clients' right to self-determination and making informed-consent

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BETH L. AARONS, J.D., MSW, principal of Aarons Law & Mediation, focuses her law practice on mediation and collaborative law process in family law and estate disputes. She is currently the president of the Massachusetts Collaborative Law Council and a director and certified mediator at the Massachusetts Council on Family Mediation.

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OFFERING A LIFELINE TO PARENTS THROUGH MEDIATION

BY SUSAN M. DEMATTEO, KAREN J. LEVITT AND CYNTHIA T. RUNGE

As a result of the pandemic, it is harder for families to access justice than ever before. Even with the use of lawyers, many individuals are struggling to move their cases forward. Some struggle as a result of their own limited means, while others lack knowledge about how to get into court, or how to use or access technology to help them in court, among myriad other challenges. As such, those trying to resolve their family law matters during the pandemic confront barriers, many of which did not previously exist. Ultimately, the lack of access to justice flowing from the pandemic is hurting families who need help.

Mediation and other dispute resolution processes, such as collaborative law, can provide options for those whose cases are seemingly frozen in court, as well as for those who have not yet filed. Family law mediators can make their clients' mediation experiences useful and impactful even in the virtual world. As a result, mediation can be a lifeline to help parties move through physical and emotional barriers to dispute resolution. But what do those barriers look like?

PHYSICAL BARRIERS

Family law mediator, collaborative attorney and parent coordinator Susan DeMatteo says that "Parents dealing with a divorce during the pandemic face extra challenges and barriers that inhibit their ability to resolve their cases. These parents are juggling more responsibilities and challenges than ever before. Fewer daycare slots are available for young children. Most schools are operating on a remote basis or using some sort of hybrid model. While most parents are not technically 'homeschooling' their children, these parents still need to be available to assist their children as they navigate the remote learning environment. This is all happening while the parents are juggling their own work responsibilities. Their own jobs may require physical attendance at the workplace, or they, too, could be working some sort of hybrid model. Navigating a divorce during this time adds yet another level of barriers and challenges to the mix. They now worry about how to work with family law professionals in a remote manner. Do they have and understand the technology? How will they use it to communicate with family law professionals and with the court? While many people have become proficient at attending virtual meetings, it may be a challenge for others. How will they gather the necessary financial disclosures and then review, discuss and exchange the documents in a safe and private manner? How will they discuss co-parenting in a private setting away from their children? As family law professionals, it is important that we address these concerns with our clients. We can offer as much flexibility as possible for our clients, and we can assist them in using technology and offer assistance and suggestions for gathering documentation. As family law mediators, we can offer these lifelines to help them overcome physical barriers that are getting in the way of their divorce process."

EMOTIONAL BARRIERS

Cynthia Runge, mediator, collaborative attorney and family law attorney, says, "Clients frequently express a sense of frustration and uncertainty, not knowing when they will be able to get into court. As family law professionals, we know it is important to acknowledge what our clients may be dealing with emotionally during the pandemic: overwhelmed with work/life responsibilities, safety/privacy concerns about how they will participate in the mediation or collaborative process without interruption, financial concerns due to layoffs or limited work ability/capacity, among other pressures. As a result, self-care practices for both the clients and the mediator are even more important than before. Adequate sleep, eating nutritional food, and regular exercise are all well-known tools for maintaining health and managing stress. Mediation is often less expensive and far less stressful than litigation. Mediation, in my opinion, is also more mindful. Mindfulness practices take many shapes and forms: meditation, being in nature, yoga, and focusing on the breath can help all of us stay more grounded and centered during unsettling times. Mediation is a more mindful process because it allows us to create a reflective space for resolving disputes. It allows us to be focused on the present moment and all the emotions that are present in that moment. Having that space for discussion and reflection can be a lifeline to all those involved in family law matters. Mindfulness is something I endeavor to incorporate into my own day-to-day practices and suggest to others going through the divorce process."

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CYNTHIA T. RUNGE is the founder of Peridot Family Law in Boston. Her practice includes divorce mediation and family and collaborative law matters. Peridot Family law takes a holistic approach to resolving family conflict.

WHAT ARE SOME OF THE CHALLENGES FOR FAMILY LAW MEDIATORS DURING THE PANDEMIC?

Karen Levitt, mediator, collaborative professional and family law attorney, says, "The psychological barriers to parties who are either in the court system already or wanting to get divorced and have not yet filed cannot be underestimated during the pandemic. It is not just about when they will get into court; parties are confused about whether and how they can access the court system and have a real sense of being 'stuck.' For mediators, it is important to find time as part of the mediation process to acknowledge the high level of stress being experienced by our clients during the pandemic and show empathy and compassion, but also provide them hope for resolution and the future. The mediation 'lifeline' gives clients balance between their emotional needs and feelings during the pandemic, and the practical realities of wanting to get divorced and move forward in life. Mediation can provide access to that safe space where clients can have guidance and support in working through their issues, with or without attorneys present, and whether in or out of court. Mediation is a necessary component of access to justice for many; mediators thinking creatively about ways to provide services

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VIEW FROM THE MEDIATOR'S CHAIR — WHAT TO DO (AND NOT DO) IN MEDIATION

BY ARTHUR PRESSMAN

Switching chairs from advocate to mediator affords a new perspective. As some have reminded us over the years, what you see depends on where you sit (or stand). Conduct that I once thought was useful as an advocate, I now see as counterproductive. Here's a short list of mediation behaviors that may adversely affect the likelihood of resolution. From where I sit as a mediator of franchise disputes, lawyers may impede resolution if they don't follow these steps.

1. DO NOT ASK TO SKIP THE OPENING SESSION

How many times have you asked the mediator to dispense with a joint session for fear that participants will be angry with each other? Do you honestly believe that emotion will disappear when the parties move to caucus sessions? Or are you really signaling your own discomfort with emotion? If anger or other emotion is triggered by the dispute, moving the parties, and the emotion they feel, into another room doesn't do anything to advance resolution. Let the clients be heard by the others; it may help everyone to understand why the dispute arose in the first place and how to resolve it now. Even the most straightforward book account action has a bible story at its heart. Lawyers are well-advised to give the clients, not themselves, the opportunity to give it voice. After all, it's the client's story, not the lawyer's, to tell.

2. REMEMBER THAT YOUR CLIENT IS AT MEDIATION TO SETTLE A DISPUTE — DOES YOUR ANNIHILATION OF THE OPPOSING PARTY IN THE OPENING SESSION FURTHER THAT GOAL?

The scorched-earth opening, full of fire and brimstone, may momentarily thrill your client but is otherwise remarkably ineffective. I've never seen a party apologize and withdraw its claim after being on the receiving end of a lawyer-opening meant only for a client's ears. I have, however, seen a party (and his lawyer) walk out of mediation and set resolution back for months after being excoriated for bad faith, double-dealing, thievery and the like in a no-holds-barred opening. Remember the story of Rashomon, or its Hollywood version, "The Seven Samurai" — what you see does not make it so. Everyone has his own version of the past. Mediation is the time to look to the future, not the past.

3. LET YOUR CLIENT BE AN ACTIVE PARTICIPANT, PARTICULARLY DURING THE OPENING JOINT SESSION

Studies show that disputing parties evaluate the success or failure of a mediation less on whether their case settles, and more on whether they feel that they have been heard. Plaintiff or defendant, franchisor or franchisee, it makes no difference — each of them has a story to tell and is aching to get it out. The more the lawyer controls the airwaves, the less airspace is left for the client. In addition, as an advocate, you lose a valuable opportunity to see how your client presents in something other than the question-and-answer rhythm of examination in deposition. And, more importantly, your client, if silent, loses the opportunity to directly tell his counterpart how the dispute has affected him, and how much he hopes that the parties come to accord. As it is in a trial, the lawyer is the painter and not the painting. Let it be about your client, not about you.

4. ASK YOURSELF HONESTLY, WHY ARE YOU AT MEDIATION? DO YOU REALLY WANT TO SETTLE A CASE, OR DO YOU WANT SOMETHING ELSE?

Free-ish discovery, a second (or first) look at the other side, another billing opportunity, satisfaction of a mandatory step in a dispute resolution clause in a franchise agreement, or because a judge or arbitrator ordered, directed or strongly suggested you should? These are all plausible reasons why a lawyer might be at mediation, but not likely why your client is there. She wants to settle the case; you hopefully have many cases, but she only has one. If you are there for something other than resolution, ask your client why she is there. Only if the two of you are on the same page will a mediation work for you both. And if it works for the lawyer but not for the client, it hasn't really worked for the lawyer either.

5. TREAT YOUR COUNTERPARTY WITH RESPECT. HOW HARD IS THIS, YOU ASK?

I've seen lawyers and clients (more lawyers, I admit) drip with sarcasm and contempt when addressing their mediation counterparties, and to what end? All it does is show a lack of self-control or worse for the offending actor and create more work for the mediator to keep everyone dedicated to the task of resolution, and not heading for the elevators. In an international mediation, I once heard a U.S.-franchisor refer to his Latin-American master-franchisee as "you people." Tone-deaf, ethnically insensitive, contemptuous — you pick a description for it — but it did not build a bridge to resolution.

6. REMEMBER, THERE'S LITTLE OR NO INDEPENDENT VALUE IN BEING RIGHT

Ok, I've said it. This proposition is the hardest thing for lawyers to swallow, or much less repeat with conviction to their clients. In franchise disputes, we are not fighting against racial injustice or for the right to vote (two things where public pronouncement of right and wrong is important to us all); we are usually fighting in private over money, property and other coin of the realm where we balance multiple considerations, legal and non-legal, risk and expense, on our path to a resolution with which we can live. The real value in resolution is finality, not that one party prevails over the other.

7. WHEN YOU PICK A MEDIATOR, DON'T PICK ONE YOU EXPECT TO LEAN ON YOUR OPPOSITION

What, you ask? Isn't the point of picking a mediator to select one who will be your ally, carry your water and generally tell the other side how terrible its case is? Not exactly. I submit that the mediator you want is the one who will help your settle your case, and one who doesn't lower the boom on your opposition to accomplish that goal. That boom swings both ways, and it's equally likely that your opposition will abandon the mediation and press forward rather than lose face in front of his client at mediation. In fact, the best advice I can give is to let your opponent pick the mediator. That way, you'll end up with someone he respects and to whom he will listen, rather than the "strong" mediator you forced on him solely to beat him into submission.

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8. MAKE SURE YOU BRING THE RIGHT PEOPLE WITH YOU, AND THAT OPPOSING COUNSEL DOES THE SAME

In my first mediation as a mediator, I found myself talking at midnight on the phone to the wife of a franchisee who was on the receiving end of a termination action by his franchisor. By that time, we had been mediating for almost 15 hours, and at that moment I realized why our mediation was still going strong — the franchisee had been calling her at each point in the negotiation for input, and because she was not in the room with the rest of us, she didn't really have a good sense of how the mediation was going. Her instructions only reflected what she wanted and not what was possible. I should have found out before the mediation that the franchisee's business was his family's business, and I should have pressed for her attendance. I now always ask in advance if all decision-makers and decision-influencers will be in the room. If key people on whom either side relies are not present, you will face a communication obstacle that may prevent resolution.

9. MOST IMPORTANTLY, DO YOUR OWN RISK ANALYSIS TO SHOW WHAT'S AT RISK IF YOU DON'T SETTLE AT MEDIATION, AND WHAT'S YOUR BEST (AND WORST) ALTERNATIVE TO SETTLEMENT

You need to understand how much it is going to cost you and your client to continue to trial if mediation fails — not what your client has already paid, or what you have already billed. That's sunk and shouldn't really be part of the matrix for deciding whether to settle at mediation or go to trial. The real issue for you and your client is what your "going forward" expenses and fees will be. Then, you need to realistically consider the likelihood that you will prevail at trial — not a rose-colored-glasses view that only looks for support for your claims and dismisses all contrary evidence. If you only have a 50% (or less) chance to win, say it aloud to yourself and tell your client too. Then, be realistic about your potential damage ranges. Do you have a low, middle and high range of expected damages if all, or less than all, goes your way at trial? The figures will give you a basic risk assessment that you should consider in deciding whether to accept offers at mediation. From this analysis, you'll arrive at your best and worst alternatives to a negotiated agreement. If you ignore data, and concentrate on gut instincts, you run a real risk of missing what was obvious had you only thought about it. ■

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LIFELINE TO PARENTS
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to meet the needs of the times is critical. Mediators need to be technologically competent, bring in third parties when needed to address complicated or highly charged issues that might benefit from the expertise of a neutral, and expand their tools and techniques to make room for pandemic-related concerns, many of which are totally new to mediation."

WHAT TOOLS AND TECHNIQUES ARE AVAILABLE TO HELP PARTIES MOVE FORWARD WITH THEIR FAMILY LAW DISPUTES?

One technique that mediators can use is to find ways to build trust with clients from the start. Although most mediators are currently only mediating virtually, parties still need to feel really heard. How can mediators help? Karen Levitt says, "Take the time to meet and talk with the parties first, just like you would if you were meeting in person. Consider using breakout rooms to check in with each party to see how they are doing, assuming the parties agree to private caucuses. Streamline ways to exchange documents in advance of mediation sessions, where it is harder to do by Zoom through screen sharing. Utilize forms to make things easier for clients." These are just a few tips that can have a big impact on the effectiveness of the mediation.

As mediators, we regularly use reframing as a tool. Bill Eddy, a well-known licensed clinical social worker, lawyer and founder of the High Conflict Institute, asks parties in a mediation, "What is your proposal?" in order to help high-conflict parties forward. Karen Levitt observed an interesting variation of that technique while serving as a mediator in a family law case. In that situation, one of the lawyers asked the other party, "What would it take for you to accept our proposal?" Asking questions that help parties use their own problem-solving skills can help them produce the best results. For more tips and ideas to effectively use mediation as a lifeline to help parents, see the information below.

On Oct. 21, 2020, Susan DeMatteo, Karen Levitt and Cynthia Runge presented a "Mediation Week" webinar for the Dispute Resolution Section of the American Bar Association titled "Offering a Lifeline to Parents through Mediation During the Pandemic and Beyond." Contact the presenters if you would like further information about their presentation. ■

FIVE TIPS FOR TRANSFORMING A CASE
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decisions in their legal matter, even if the resolution might be different from an adjudicated result.

5. DON'T STOP, CAN'T STOP, WON'T STOP

Dispute resolution processes can be engaged before anything has been filed in court, when nothing is ever filed in court, after cases have been filed in court, before and after pre-trial, on the eve of trial, after trials but before judgment, and even after a judgment is received. It is never too late to seek methods of resolution that offer clients the opportunity to avoid court, to be more in control of their own resolutions, and to be more creative in crafting a resolution more tailored to their specific circumstances than court-adjudicated solutions. Since the opportunities for self-determined resolutions are always there, particularly in a time when litigation may be at a standstill, we encourage you to never stop asking if a dispute resolution process option might be a good fit for your clients. ■

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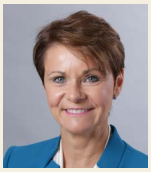

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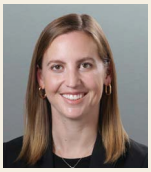

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